BEFORE THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA

JOHN DOE I and JOHN DOE II,	*	
	*	
Petitioners,	*	
	*	**DOCKET NO.: 1343294**
v.	*	
	*	
DOUGLAS J. MACGINNITIE, Commissioner, Georgia Department of Revenue,	*	
	*	
Respondent.	*	

DECISION

2013-1 Ga. Tax Tribunal, October 1, 2013

This matter is an action by Petitioners, JOHN DOE I and JOHN DOE II, seeking an order from this Tribunal requiring Respondent to offer each of the Petitioners agreements pursuant to Respondent's Voluntary Disclosure Program that provide for three year "look-back" periods rather than the five year "look-back" periods proposed by Respondent.[1]

Respondent has moved to dismiss the Petitioners' claims on the basis that this Tribunal lacks subject matter jurisdiction over the Petitioners' claims.

For the reasons stated below, Petitioners' claims must indeed be dismissed.

I. FINDINGS OF FACT

The facts stated by the Petitioners in their confidential Voluntary Disclosure Applications ("Applications"), filed as Exhibit "A" to Petitioner's Brief In Response to Respondent's Motion to Dismiss, have not been challenged by Respondent. Accordingly, those facts will be taken to

[1] The "look-back period" is the number of years that the Petitioners will be required to amend their Georgia income tax returns and pay the associated tax and interest as reflected on those amended returns. A three year look-back period is thus more favorable to the Petitioners than a five year look-back period.

be true for purposes of this Decision. Except where otherwise noted, the following summary of facts is based upon the facts as stated in the Applications.

Petitioners are two individuals, the first a firefighter and bail bondsman, the second a nurse. The Petitioners are married to one another.

In connection with the filing of their 2012 tax returns, the Petitioners found it necessary to hire a new tax return preparer to prepare their returns because their prior tax return preparer had recently died. The new return preparer requested that the Petitioners provide copies of their tax returns for the previous years. The Petitioners did so. In reviewing these prior returns, the new return preparer discovered that the previous returns included erroneous itemized deductions and incorrectly represented the filing status of each of the Petitioners. The new tax return preparer brought these errors to the attention of the Petitioners and recommended that the Petitioners engage counsel.

The Petitioners retained counsel. On or about March 12, 2013, the Petitioners, acting through their counsel, filed the Applications with the Georgia Department of Revenue pursuant to Respondent's *Voluntary Disclosure Application* directions ("Directions") and the Respondent's *Guide to Georgia's Voluntary Disclosure Program* ("Guide").[2]

The Petitioners, in their respective Applications, stated that they had relied upon their prior, now deceased, tax return preparer and that they were not aware that their respective returns were prepared incorrectly until the errors in the prior income tax returns were brought to their attention by the newly hired tax return preparer.

[2] The Directions can be found on the Department of Revenue website at https://etax.dor.ga.gov/compliance/voluntarycompliance/VDA_APPLICATION_(revised_8-09).pdf and the Guide at https://etax.dor.ga.gov/compliance/voluntarycompliance/GUIDE_TO_VDA_(revised_8-09).pdf.

Petitioners also stated in their Applications that they had not been previously contacted by the Internal Revenue Service or the Georgia Department of Revenue with respect to the years to which the Applications relate.

In response to these Applications, the Respondent prepared and provided to Petitioners proposed Georgia Individual Income Tax Agreements No. 13-227 and No. 13-228 (the "Voluntary Disclosure Agreements"). Copies of the proposed Voluntary Disclosure Agreements are appended to Petitioner's Brief in Response to Respondent's Motion to Dismiss as part of Exhibit "A". Respondent specified in Paragraph 1 of each Voluntary Disclosure Agreement,

> "1. The Taxpayer will submit one signed copy of this agreement, Georgia Form 500X amended Individual Income Tax Return and payment for tax due for 2007 through 2011. These documents will be submitted within sixty (60) days of the signing of this Agreement by the Department."

The Petitioners filed their Petition with this Tribunal objecting to the proposed Voluntary Disclosure Agreements as proffered by the Respondent. Petitioners seek relief from this Tribunal requiring Respondent to revise each of the Voluntary Disclosure Agreements to provide for a three year look-back instead of a five year look-back period. In response, Respondent filed the Motion to Dismiss which is the subject of this Decision.

II. CONCLUSIONS OF LAW

As this matter raises questions as to the scope of the Tribunal's jurisdiction, it is first necessary to engage in a brief review of the operative statutes creating the Tribunal and the scope and nature of its jurisdiction before turning to the specifics of the Voluntary Compliance Program and its application to Petitioners.

A. The Role of the Tribunal.

For many years prior to the creation of the Georgia Tax Tribunal, tax practitioners and the business community had engaged in an ongoing dialogue as to whether Georgia should create a specialized court to address Georgia tax cases. The key event in crystallizing this discussion and bringing the idea for a separate tax tribunal to fruition was the creation by the Georgia Legislature of the 2010 Special Council on Tax Reform and Fairness for Georgians. The Legislature established the Council pursuant to O.C.G.A.§ 28-12-2 (HB 1405) to "conduct a thorough study of the state's current revenue structure and make a report of its findings and recommendations for legislation to the Speaker of the House and the Lieutenant Governor no later than January 10, 2011."

As one of the recommendations in its Final Report issued in January 2011, the Council recommended the establishment of a new specialized tax court for the resolution of tax disputes.[3] The Council noted that such a court would enhance both "Georgia's position as a business friendly state" and the transparency and predictability of tax administration.

Subsequently, Rep. Allen Peake (R-Macon) introduced and sponsored the legislation to create the Georgia Tax Tribunal in the 2012 Legislative Session. Gov. Nathan Deal and a broad base of interests, including the Georgia Chamber of Commerce, the Georgia Department of Revenue, the Georgia Society of CPAs and members of the Tax Bar supported the legislation. As Rep. Peake has noted publicly, the legislation did not draw a single dissenting vote.

On April 19, 2012, Gov. Deal signed into law House Bill 100 (HB 100 [2011-12 Reg. Session]), cited as the "Georgia Tax Tribunal Act of 2012," which created the Georgia Tax

---

[3] The Final Report can be found at http://fiscalresearch.gsu.edu/taxcouncil/downloads/FINAL_REPORT_Jan_7_2011.pdf

Tribunal effective January 1, 2013. This legislation creating the Georgia Tax Tribunal is codified as part of the Official Code of Georgia as O.C.G.A. § 50-13A-1, *et seq.*

The goals of the General Assembly for the new Tribunal are stated succinctly in O.C.G.A. § 50-13A-2:

> § 50-13A-2. Role of agency.
>
> The General Assembly finds that there is a need for an independent specialized agency separate and apart from the Department of Revenue *to resolve disputes between the department and taxpayers in an efficient and cost-effective manner.* Such an agency would:
>
> (1) Improve the utilization of judicial resources by resolving tax cases in a more streamlined and efficient manner;
>
> (2) Increase the uniformity of decision making in tax cases;
>
> (3) Improve the equal access of all parties to court process; and
>
> (4) Increase public confidence in the fairness of the state tax system. (emphasis added).

The Tribunal's jurisdiction is specified in O.C.G.A. § 50-13A-9(a):

> § 50-13A-9. Petitions for relief; jurisdiction; bonds.
>
> (a) On and after January 1, 2013, any person may petition the tribunal for relief as set forth in Code Sections 48-2-18, 48-2-35, 48-2-59, 48-3-1, 48-5-519, 48-6-7, and 48-6-76 and subparagraph (d)(2)(C) of Code Section 48-7-31. The tribunal shall have jurisdiction over actions for declaratory judgment that fall within subsection (a) of Code Section 50-13-10 and involve a rule of the commissioner that is applicable to taxes administered by the commissioner under Title 48.

This section then goes on to provide in O.C.G.A. § 50-13A-9(b) that the Tribunal's jurisdiction is concurrent with the Superior Court over the matters specified.

> (b) The tribunal shall have concurrent jurisdiction with the superior courts over those matters set forth in subsection (a) of this Code section.

To implement the Tribunal's jurisdiction under O.C.G.A. § 50-13A-15(a), the Tribunal judge is directed to:

> (a) . . . render all final judgments and interlocutory orders in writing, as appropriate, including therein a concise statement of the facts found and the conclusions of law reached. The tribunal judge's final judgment or interlocutory order shall, subject to law, *grant such relief, invoke such remedies, and issue such orders as the tribunal judge deems appropriate to carry out its final judgment or interlocutory order.* (emphasis added)

And O.C.G.A. § 48-2-59, which is one of the enumerated grants of jurisdiction to the Tribunal, provides in relevant part:

> § 48-2-59. Appeals; payment of taxes admittedly owed; bond; costs.
>
> (a) Except with respect to claims for refunds, either party may appeal from any *order, ruling, or finding of the commissioner* to the Georgia Tax Tribunal in accordance with Chapter 13A of Title 50 or the superior court of the county of the residence of the taxpayer, except . . . [various matters not applicable to this case.] (emphasis added).

As the Tribunal has been given jurisdiction concurrent with that of the Superior Courts as to the matters specified in O.C.G.A. § 50-13A-9(a), and given the explicit stated goal of the Legislature that there be uniformity as to tax matters, it follows that the jurisdiction of the Tribunal and nature of relief that can be granted by the Tribunal must be consistent with those that would be available to litigants if the action before the Tribunal were brought in Superior Court. Similarly, limitations on remedies that would apply if the matter had been litigated in Superior Court must likewise apply to the Tribunal.

B. Respondent's Voluntary Disclosure Program.

Individual taxpayers with Georgia source income are required to file income tax returns with the Respondent. O.C.G.A. § 48-7-50. The due dates for individual Georgia income tax

returns follow the federal income tax return due dates and federal extensions of time within which to file are recognized for Georgia income tax filing purposes. O.C.G.A § 48-7-56.

The statute of limitations with respect to Georgia income tax returns generally runs three years from the due date of the return, as extended, or the filing date, whichever is later. O.C.G.A. § 48-2-49(b). One exception to the normal three year statute of limitations rule is that when a fraudulent return is filed, there is no statute of limitations. O.C.G.A. § 48-2-49(c). Another occurs where there is an omission from gross income of an amount which is in excess of 25% of gross income, in which case a six year statute of limitations applies. O.C.G.A. § 48-7-82(b)(2). In addition, under O.C.G.A. § 48-7-82(e)(1), if a Georgia taxpayer's net income on the taxpayer's federal tax return is modified by the IRS, the taxpayer must file a return with the Respondent within 180 days after the final determination of the changed or corrected income. If the taxpayer does not do so, the Respondent can make an assessment for the taxes due based on the change or corrections within five years from the date the report making the federal adjustment is received by Respondent.

Willful failure to file a return is a misdemeanor. O.C.G.A. § 48-7-127(c). If a return is filed late or is incorrect, the taxpayer is potentially subject to penalties under O.C.G.A §§ 48-7-57 and 48-7-86 and is liable for interest under O.C.G.A § 48-7-81.

There is no duty to file an amended return to correct a previously filed erroneous return when that error is discovered subsequent to filing.[4] In order to encourage voluntary filings of

[4] Lawyers and accountants may well be required to advise their clients to file amended returns when an error is discovered on a prior year return. But it does not follow that taxpayers are required to heed such advice or that it is wise to do so in all circumstances. See Michael E. Bailliff, "Advising Clients Regarding Erroneous Tax Return Positions: Part 1", *The Tax Adviser*, June 2013, http://www.aicpa.org/Publications/TaxAdviser/2013/June/Pages/Bailliff_June2013.aspx ; Jay A. Soled and Leonard Goodman, "Tax Return Preparation Mistakes", *Journal of Accountancy*, June 2010, http://www.journalofaccountancy.com/Issues/2010/Jun/20102524.htm ; Sheldon D. Pollack, "What Obligations Do Taxpayers and Return Preparers Have to Correct Errors on Returns?", *The Journal of Taxation*, V.72, No.2, pp. 90-93 (February, 1990),

returns by delinquent taxpayers and the filing of corrected returns in appropriate circumstances, the Respondent has implemented the Voluntary Disclosure Program as described in the Guide. The Voluntary Disclosure Program is entirely a matter of administrative grace, not of right. By creating the Voluntary Disclosure Program, the Respondent has created an incentive for taxpayers to come forward and correct otherwise erroneous returns. The principal benefit to the taxpayer is the waiver of penalties. But, as its name indicates, the program is entirely voluntary.

---

http://www.buec.udel.edu/pollacks/Downloaded%20SDP%20articles,%20etc/academic%20articles/Obligations%20to%20Amend%20in%20Jl%20of%20Taxation%201990.pdf .

To the contrary, it is well settled for federal income tax purposes that there is no duty to file an amended return with respect to a return which was erroneous when filed but where the error was unintentional. Badaracco Sr. v. Commissioner, 464 U.S. 386 (1984). This is true even though applicable Treasury Regulations enumerate circumstances and state that amended returns "should" be filed and any tax due be paid. See Treas. Reg. §§ 1.451-1(a) and 1.461-1(a)(3). The use of "should" instead of "must" or "shall" in these provisions has been interpreted as recognition that there is no independent duty to file amended returns.

There do not appear to be any cases in Georgia which have explicitly addressed the issue for Georgia income tax purposes. But the logic that underpins Badaracco leads to the same conclusion as to the duty to file amended Georgia income tax returns.

There are a number of instances in Title 48, Chapter 7 where amended returns are permitted. See, *e.g.*, O.C.G.A. §§ 48-7-29.6, 48-7-39, 48-7-40.24, 48-7-40.25, 48-7-82 and 48-7-121. And Regulation 560-7-8-.17 "Period of Limitation Upon Assessment and Collection" states that the statute of limitations under O.C.G.A. §§ 48-2-49 and 48-7-82 runs from the date an amended return was filed only to the extent of such specific changes. Similarly, the Respondent has long permitted filing of amended income tax returns on Georgia Form 500X. https://etax.dor.ga.gov/inctax/2012_forms/TSD_Amended_Indivdual_Tax_Return_500X_TY2012.pdf And Respondent has stated that in certain circumstances taxpayers "should" file amended returns. For instance on the Department of Revenue Website, under the heading of frequently asked questions, the following appears:

"What should I do if I received an additional W-2 or 1099 after I filed my return?
A. File Form 500X to amend your return."

But nowhere does the Official Code of Georgia or Respondent's regulations require filing of amended returns in such circumstances.

For Georgia to have a different rule from the federal rule when the two systems are so intertwined would make no administrative or logical sense. Because the computation of Georgia taxable income is so inextricably tied to the calculation of income for federal income tax purposes, the Georgia filing and reporting structure is tied to the federal filing system, and adjustments to federal income calculations trigger automatic adjustments for Georgia income tax purposes, in the absence of any statutory or regulatory authority to the contrary, it follows under the logic of Badaracco that there is no requirement to file an amended Georgia income tax return when it is subsequently discovered that a previously filed tax return is erroneous.

The rationale for the adoption by Respondent of a Voluntary Disclosure Program and entering into such agreements by the Department of Revenue is summarized cogently in the Voluntary Disclosure Agreements themselves.

> "WHEREAS, the Department recognizes the problematic nature of attempting to impose tax for prior periods under the circumstances in this matter, and is concerned with achieving compliance for prior, current, and future periods; and
>
> WHEREAS, without the expense and uncertainty of litigation, both parties desire to resolve all outstanding individual income tax issues;".

The Respondent's Voluntary Compliance Program is not a part of the Respondent's Regulations. Nor has it been adopted pursuant to the Administrative Procedures Act. Rather, it represents a statement of the administrative position of the Department of Revenue with respect to such disclosures.

C. Jurisdiction.

As the Respondent has correctly noted, what the Petitioners are requesting is an order from this Tribunal requiring the Respondent to offer them disclosure agreements with a three year look-back period (i.e., only back to the tax year 2009) rather than for a five year look-back period (i.e., back to tax year 2007).

Inapplicability of O.C.G.A. § 50-13-10(a). The parties have spent considerable effort in their arguments discussing whether this Tribunal has jurisdiction of this matter under the declaratory judgment provisions of O.C.G.A. § 50-13-10 incorporated under O.C.G.A. § 50-13A-9(a). That Code Section provides that "...the tribunal shall have jurisdiction over actions for declaratory judgment that fall within subsection (a) of Code Section 50-13-10 and involve a rule of the commissioner that is applicable to taxes administered by the commissioner under Title 48."

Consequently, the only declaratory judgment actions over which this Tribunal has jurisdiction are ones brought pursuant to O.C.G.A. § 50-13-10(a). This Code section provides that

> [t]he validity of any rule, waiver, or variance may be determined in an action for declaratory judgment when it is alleged that the rule, waiver, or variance or its threatened application interferes with or impairs the legal rights of the petitioner. A declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule, waiver, or variance in question.

O.C.G.A. § 50-13-2(6) defines "rule" as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of any agency" while O.C.G.A. § 50-13-2(1) defines "agency" as "each state board, bureau, commission, department, activity, or officer authorized by law expressly to make rules and regulations or to determine contested cases," with specified exceptions. Id. See also O.C.G.A. § 50-13-9.1(b)(2) (defining "variance"); O.C.G.A. § 50-13-9.1(b)(3) (defining "waiver").

Whether the Guide, Instructions or the Voluntary Disclosure Policy itself constitutes a "rule" for these purposes is questionable.[5] But even assuming, without deciding, that the Guide, Instructions and the Voluntary Disclosure Policy are "rules" for purposes of O.C.G.A. § 50-13-10(a), the Petitioners' request for declaratory relief still fails for two reasons.

---

[5] If a "policy [is] merely the agency's interpretation of existing laws, not an independently promulgated agency rule, [it does] not bring [a] plaintiff within the scope of O.C.G.A. § 50-13-10. Georgia Oilmen's Ass'n v. Dep't of Revenue, 261 Ga. App. 393, 400 (2003) (holding that the Department of Revenue's policy of prohibiting split deliveries of alcoholic beverages is not a rule subject to declaratory judgment challenge); Roy E. Davis & Co. v. Dep't of Revenue, 256 Ga. 709, 711 (1987) ("[Sales tax] Form ST-1 has never been enacted as a DOR rule pursuant to the APA. Therefore, the form is an "interpretive rule," not a "rule" within the meaning of § 50-13-10"); see also Dep't. of Medical Assistance v. Beverly Enterprises, 261 Ga. 59, 60 (1991) (state agency's manual could not be reviewed under O.C.G.A. § 50-13-10).

First, the Petitioners have misread the Guide. Petitioners assert that the Guide provides for a three year look-back period for all income taxpayers except those who have filed federal income tax returns and not Georgia income tax returns. The Guide does state:

> "...The look-back period will usually be for a minimum of three years for all tax types.
>
> For individual income tax, the look-back period can be extended up to five years for those taxpayers who have filed their federal income tax returns yet have failed to file a Georgia income tax return. . . ."

The Guide, however, also states explicitly that "the length of the look-back period will depend on the nature of the company's or individual's activities and the size of past years' potential tax liabilities as submitted in the application." Respondent has thus expressly reserved the discretion to adjust the period of the look-back period based upon the taxpayers' submissions.

But even more fundamentally, O.C.G.A. § 50-13-10(a) does not apply because the Petitioners are not challenging the *validity* of the Guide. To the contrary, Petitioners are seeking to avail themselves of the Guide and to oblige Respondent to do something which they contend is mandated by the Guide. As such, their request for relief does not constitute a challenge to the validity of a rule. So O.C.G.A. § 50-13-10(a) by its terms does not apply to provide this Tribunal jurisdiction.

Jurisdiction under O.C.G.A. § 48-2-59(a). But the analysis does not stop there. The Petitioners are actually requesting an affirmative order in the nature of a writ of mandamus directing Respondent to issue each of them a Voluntary Disclosure Agreement with a five year, rather than a three year, look-back period. Respondent has not suggested that Petitioners are entitled to receive any further administrative consideration as to their request for the three year look-back or suggested that they have failed to exhaust their administrative remedies. So Respondent's position on the matter at issue is final. This Tribunal has jurisdiction to review

"any order, ruling, or finding of the commissioner" under O.C.G.A. § 48-2-59(a). Petitioners' case thus constitutes an appeal under O.C.G.A. § 48-2-59(a) to the *finding* of the Respondent that their respective circumstances do not justify a three year look-back under the Guide and a *ruling* by the Respondent not to grant them a three year look-back period pursuant to the Guide as part of their Voluntary Disclosure Agreements.

This conclusion is not only required by the language of O.C.G.A. § 48-2-59(a), but is the only conclusion consistent with the directives of O.C.G.A. § 50-13A-2. As our General Assembly has specified, this Tribunal is to serve as an independent specialized agency "separate and apart" from the Department of Revenue "to resolve disputes between the department and taxpayers in an efficient and cost-effective manner." To conclude otherwise would mean that this Tribunal, the Superior Courts and ultimately the Georgia Supreme Court have no jurisdiction to review Respondent's actions in the administration of the tax laws of Georgia. But we know that is not the case. Gable Industries, Inc. v. Blackmon, 233 Ga.542 (1975) (Respondent not permitted to withdraw permission to file consolidated returns retroactively after the taxpayer had relied upon such permission).

Scope of Review. Although this Tribunal has jurisdiction to review the Petitioners' case, it does not follow that the Petitioners can prevail on their request for relief, however.

Respondent is charged with administering the tax laws of the State of Georgia and has broad discretionary powers to do so. This includes the power to waive penalties and interest and to settle or compromise tax disputes when Respondent determines that doing so is in the best interests of the state. See O.C.G.A. §§ 48-2-7, -8, -12, 18.1, -41, -43, -60; Hicks v. Fla. State Bd. of Admin., 265 Ga. App. 545 (2004).

The courts are, therefore, rightly reluctant to interfere with the Respondent's discretion in performing his duties. For this reason, the exercise of discretion by the Respondent is not subject to review by the courts in the nature of a mandamus action except in limited circumstances. See Dep't of Revenue v. Owens Corning, 283 Ga. 489, 490 (2008); Hicks v. Fla. State Bd. of Admin., 265 Ga. App. 545 (2004); Bland Farms, LLC v. Dep't of Agriculture, 281 Ga. 192 (2006). As explained by the Georgia Supreme Court in Bland Farms,

> an agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. . . . Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

Id. at 195.

It is thus well established that mandamus, which permits a plaintiff to require action on the part of a government official, is only available when the plaintiff has a clear legal right to the relief sought or the public official has committed a gross abuse of discretion. O.C.G.A. § 9-6-21; Bland Farms, LLC, 281 Ga. at 193; Clear Vision CATV Services, Inc. v. Mayor of Jesup, 225 Ga. 757 (1969). Absent these special circumstances, mandamus cannot be used to compel a discretionary act. Marbury v. Madison, 5 U.S. 137, 171 (1803) ("Where the head of a department acts in a case in which Executive discretion is to be exercised, in which he is the mere organ of Executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."); Clear Vision CATV Services, Inc., 225 Ga. at 758 ("What the plaintiff seeks here is to substitute the judgment of the court for the judgment of the city commission. This the court will not undertake.").

Petitioners assert that the Respondent's position on the look-back period issue is "adverse to fair tax administration" and "discourages voluntary disclosure" because it "punishes those who want to amend prior year returns" and "provides federal non-filers better terms than those who file" and that, broadly speaking, the "nature of [Petitioners'] activities and size of potential tax liability warrant . . . a three year look-back period." These arguments may well be meritorious. They may well cause Petitioners to reconsider their decisions to proceed with the Voluntary Disclosure Applications and encourage them to instead play the justly disdained "audit lottery."[6] But these arguments are properly addressed to the Respondent's discretion, not to this Tribunal.

This Tribunal, therefore, must decline the Petitioners' invitation to substitute its judgment for that of the Respondent in administering his Voluntary Disclosure Policy.

Accordingly, the Petitioners' Petition must be dismissed.

SO ORDERED, this 1st day of October, 2013.

/s/ Charles R. Beaudrot, Jr.
CHARLES R. BEAUDROT, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL

[6] (See Authorities and Discussion at Footnote 4, supra.)

ON MOTION FOR RECONSIDERATION AND CLARIFICATION

Respondent filed a Motion for Reconsideration and Clarification and Brief in Support Thereof dated October 11, 2013 ("Respondent's Motion") with respect to the Tribunal's Decision in this case dated October, 1, 2013 ("Original Decision").

In response to the Respondent's Motion, the Tribunal clarifies the Original Decision as follows:

1. This Tribunal has jurisdiction over the Petition. See Original Decision at pages 11-12,

2. To reiterate, under O.C.G.A. § 50-13A-15(a), the Tribunal has the authority to:

> *. . . grant such relief, invoke such remedies, and issue such orders as the tribunal judge deems appropriate to carry out its final judgment or interlocutory order.* (emphasis added)

3. Although as Respondent correctly points out in Respondent's Motion, the Tribunal does not have jurisdiction to enter a writ of mandamus, the same prudential considerations which underlie limitations on the grant of mandamus relief apply to the entry of orders by the Tribunal under O.C.G.A. § 50-13A-15(a).[7] Thus in the analogous area of appeals under the Georgia Administrative Procedure Act, the Supreme Court of Georgia has recently noted that the "gross abuse of discretion" standard applicable in mandamus actions is similar to the standard of review in appeals of discretionary administrative actions. Scarborough v. Hunter, 293 Ga 431, 435 n.5 (2013).

[7] No doubt that is why Respondent included cases discussing limitations on mandamus in its citation of authority supporting its original Motion to Dismiss, as these same principles apply by analogy to the orders of the Tribunal.

4. Deference is due to Respondent in the exercise of discretion entrusted to him in the administration of the tax laws. Original Decision pp. 12-14. But such deference does not mean that the findings, rulings and orders of Respondent are not subject to review. To so conclude would frustrate the very purposes for which the Tribunal was established and, indeed, would raise Due Process concerns. The power to exercise discretion is quite different from "a right to act arbitrarily and capriciously." Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. Ga 1964); cf. Barrett v. Hamby, 235 Ga 262 (1975).

5. Although the Civil Practice Act (other than its discovery provisions) does not apply directly to actions before the Tribunal, the Tribunal Judge is directed to adapt the provisions of the Civil Practice Act where suitable under the Tribunal Rule 616-1-3.02 as adopted in Standing Order dated June 1, 2013 and O.C.G.A § 50-13A-1-15(b). The facts in this matter were not disputed. The parties relied upon the pleadings as supplemented with documents submitted by Petitioners as Exhibits to their Petitioner's Brief in Response to Respondent's Motion to Dismiss. The Original Decision is thus a ruling on the merits in the nature of a judgment on the pleadings under the principles of the Civil Practice Act O.C.G.A § 9-11-12 (c).

Accordingly, Respondent's Motion is **GRANTED** insofar as it requests clarification of the Original Decision as discussed above and **DENIED** insofar as it seeks reconsideration of the

Original Decision.

SO ORDERED, this 18th day of November, 2013.

CHARLES R. BEAUDROT, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL

ZACHARY C. MEEKS,

ATTORNEY FOR PETITIONERS, JOHN DOE I and JOHN DOE II

SAMUEL S. OLENS, Attorney General, W. WRIGHT BANKS, JR., Deputy Attorney General, WARREN R. CALVERT, Senior Assistant Attorney General, NANCY M. GALLAGHER, Senior Assistant Attorney General and FRANCES C. MULDERIG, Assistant Attorney General,

ATTORNEYS FOR RESPONDENT, DOUGLAS J. MACGINNITIE, Commissioner, Georgia Department of Revenue