BEFORE THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA

FILED
AUG - 9 2023
Clara Davis, Tax Tribunal Administrator

STANLEY D. & SHERRY E. MCRAE,	*	
	*	
Petitioner,	*	
	*	**DOCKET No.: 2221630**
v.	*	
	*	
FRANK M. O'CONNELL, in his Official Capacity as Commissioner of the GEORGIA DEPARTMENT OF REVENUE,	*	
	*	
Respondent.	*	

ORDER RECONSIDERING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This case is before the Georgia Tax Tribunal following this Court's July 25, 2023 Order Granting Respondent's Motion to Compel Discovery (the "July 25, 2023 Order"). In the July 25, 2023 Order, Petitioners were ordered to respond to Respondent's discovery requests, and if Petitioners failed to comply, it would be presumed that evidence supporting Petitioners' claim of disability did not exist. It was further ordered that if that presumption was made, Respondent's Motion for Summary Judgment would be reconsidered. Petitioners responded to the July 25, 2023 Order with a claim that the information sought by Respondent is "privileged information in accordance with O.C.G.A. § 9-11-26(b)(1)."

Having read and considered the relevant briefs, arguments of the parties, and relevant case law, the Tribunal hereby agrees to reconsider its January 19, 2023 Order Denying Respondent's Motion for Summary Judgment. There are two issues in this case. The first is whether Petitioners should have excluded military retirement income in their calculation of their Georgia taxable net income for tax year 2015. The second issue is whether Petitioners properly calculated Georgia

taxable net income for their 2019 Georgia Income Tax Return for tax year 2019. For the reasons stated herein, Respondent's Motion is **GRANTED**, and judgement is entered in favor of the Respondent.

FINDINGS OF UNDISPUTED FACT

1.

Petitioners challenge Notice of State Tax Execution, letter ID L0882935920, and Official Assessment and Demand for Payment, letter ID L0855882032, issued by Respondent for tax years 2015 and 2019.

2.

Petitioners' Petition was received by the Tax Tribunal on March 11, 2022. Respondent submitted their Answer on July 6, 2022.

3.

Stanley D. McRae was not 62 years old or older during tax year 2015. See Petitioners' Response Brief, December 19, 2022, p. 9.

4.

Stanley D. and Sherry E. McRae were both full time Georgia Residents during tax years 2015 and 2019. See Exhibit C, p. 1; DOR Exhibit D, p. 1.

5.

Stanley D. McRae either refused to or was unwilling to produce any evidence of being permanently and totally disabled, as defined under O.C.G.A. § 48-7-27(a)(5(D), during tax year 2015. See Order Granting Respondent's Motion to Compel Discovery.

CONCLUSIONS OF LAW

I. Burden of Proof

It is well-settled that a tax assessment by the Department is deemed prima facie correct, and the burden of persuasion in an appeal thereof is put on the taxpayer to show errors or unreasonableness in the assessment. Blackmon v. Ross, 123 Ga. App. 89 (1970); Hawes v. LeCraw, 121 Ga. App. 532 (1970); Hawes v. Foster, 118 Ga. App. 296 (1968). As the Court of Appeals explained in Undercofler v. White: [T]he burden of proof is on the taxpayer from the beginning ... and that burden remains on him to ... show clear and specific error or unreasonableness in the Commissioner's deficiency assessment. This placing of the burden is justified by the fact that the taxpayer is the moving party in contesting the validity of the assessment and has in his possession the information necessary for such contest. Undercofler v. White, 113 Ga. App. 853, 855 (1966) (citations omitted).

II. Standard of Review

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact as to each element of its claim and the undisputed facts, when viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.GA. § 9-11-56(c); Tax Tribunal Rule 616-1-3-.19(a); see also Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991); Scholastic Book Clubs, Inc. v. Comm'r, 2017-2 (Ga. Tax Tribunal, Feb. 14, 2017).

III. It is Proper to Reconsider Respondent's Motion for Summary Judgment

a) Petitioners' Privilege Claim Does Not Excuse their Failure to Comply with a Court Order

Tribunal Rule 616-1-3-.25(a) states that "a motion for reconsideration or rehearing will be considered only if filed within ten (10) days of the entry of any Order." The rule further states that "the time for filing such a motion may be extended by a Tribunal Judge for good cause." In response

to a Motion to Dismiss filed by Petitioners, the Tribunal issued an Order denying the motion and stated that "Petitioners' refusal or inability to timely produce documentary evidence in support of their claim of disability in accordance with O.C.G.A. § 48-2-7-27(a)(5)(D) in response to a motion to compel the same filed by Respondent will be viewed by the Tribunal as good cause for extending the time necessary for filing a motion for reconsideration." See Order Denying Petitioners' Motion to Dismiss, April 20, 2023, p. 2. After several unsuccessful attempts to obtain any evidence of Mr. McRae's disability from Petitioners, Respondent did indeed file a motion to compel discovery. In their motion, Respondent requested that if evidence supporting Petitioners' claim of disability was not produced, that the Tribunal reconsider Respondent's Motion for Summary Judgment. The motion to compel was granted with this Court ordering Petitioners to respond to Respondent's discovery requests by 5:00 p.m. on July 26, 2023. It was also ordered that if Petitioners failed to comply, it would be presumed that evidence supporting Petitioners' claim of disability did not exist and Respondent's Motion for Summary Judgment would be reconsidered.

Petitioners responded to the July 25, 2023 Order within the time period set by the Tribunal with a claim that the information sought by Respondent is privileged in accordance with O.C.G.A. § 9-11-26(b)(1). O.C.G.A. §9-11-26(b)(1) states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence[.]

The Tribunal does not consider Petitioners assertion of privilege to be an adequate response to Respondent's discovery request. It is Petitioners' burden to establish that any particular documents

are in fact subject to the privilege asserted. See Ga. Cash Am., Inc. v. Strong, 286 Ga. App. 405, 408-09 (2007). Failure by a party to comply with discovery is not excused on the ground that the discovery sought is objectionable unless that party applied for a protective order under O.C.G.A. § 9-11-26(c). See O.C.G.A. § 9-11-37(d)(2); see also Ga. Cash Am., Inc. v. Strong, 286 Ga. App. 405, 414 (2007). Petitioners have not presented any evidence to demonstrate that any of the requested evidence is privileged, nor have Petitioners ever filed for a protective order in this case. Therefore, Petitioners are not excused for their failure to comply with the Tribunal's July 25, 2023 Order compelling them to respond to Respondent's discovery request. Thus, the Tribunal will presume that documentary evidence supporting Petitioners' claim of disability does not exist.

b) There are no Material Facts in Dispute Remaining

Reconsiderations are not a matter of routine practice. For a party to obtain reconsideration, the movant "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Coppage v. United States Postal Serv., 129 F. Supp. 2d 1378, 1379 (M.D. Ga 2001); see also Fluery v. Comm'r, 2016-1 (Ga. Tax Tribunal, Jan. 4, 2016). Reconsideration is "an extraordinary remedy to be employed sparingly." Id. As such, motions for reconsideration should be granted only in "certain limited situations, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice." Preserve Endangered Areas of Cobb's History, Inc. [P.E.A.C.H.] v. United States Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995).

An intervening development is cited as one of the "certain limited situations" where motions for reconsideration should be granted. In this case, the intervening development that has occurred is that the Tribunal has adopted the presumption that evidence supporting Petitioners' claim of disability does not exist. In the January 19, 2023 Order Denying Respondent's Motion for Summary

Judgment, the Tribunal found that the factual record was incomplete due to the presence of a disputed material fact. The lone material fact in dispute was whether or not Mr. McRae was permanently and totally disabled, as defined under O.C.G.A. § 48-7-27(a)(5)(D). Since the lone material fact in dispute only arose in final argument by Petitioners in response to Respondent's Motion for Summary Judgment, and since that fact is now no longer in dispute, the Tribunal finds that good cause exists allowing for Respondent's motion for reconsideration to be considered outside of the ten days stated in Tribunal Rule 616-1-3-.25(a). Thus, at this time, it is proper for the Tribunal to reconsider Respondent's Motion for Summary Judgment.

IV. Respondent's Motion for Summary Judgment

a) Tax Year 2015

This dispute is governed by O.C.G.A. § 48-7-27(a)(5)(D), which permits military retirement income to be excluded from Georgia taxable net income under certain circumstances. Specifically, the 2015 statute[1] reads:

> (a) Georgia taxable net income of an individual shall be the taxpayer's federal adjusted gross income, as defined in the United States Internal Revenue Code of 1986, less:
> . . .
> (5) (D) A taxpayer shall be eligible for the exclusions granted by this paragraph only if the taxpayer:
> (i) Is 62 years of age or older but less than 65 years of age during any part of the taxable year; or
> (ii) Is permanently and totally disabled in that the taxpayer has a medically demonstrable disability which is permanent and which renders the taxpayer incapable of performing any gainful occupation within the taxpayer's competence; or
> (iii) Is 65 years of age or older during any part of the year.
>
> O.C.G.A. § 48-7-27(a)(5)(D) (2015).

Petitioners argue that a change in the wording in the IT-511 Individual Income Tax Booklet

[1] In 2022, the law in the state of Georgia was changed allowing for an exclusion of $17,500 of military retirement income for Veterans under the age of 62. An exclusion of up to $35,000 of military retirement income is available if

caused a military benefit that Petitioners had previously been able to take advantage of to be eradicated. Petitioners' specifically point to the words "Whose Home of Record is Georgia," which appears in the 2015 Tax Booklet, but does not appear in the 2016 Tax Booklet. While both Mr. McRae and Mrs. McRae are Military Veterans, only Mr. McRae received retirement income during Tax Year 2015. Petitioners claim that because Mr. McRae's Home of Record is Florda, his military retirement income was exempt from state of Georgia taxation prior to the changes to the 2016 Tax Booklet instructions. The Tribunal finds that Petitioners' argument is without merit. Prior to the removal of the above-mentioned phrase from the 2016 Tax Booklet, the 2015 Tax Booklet called for Military personnel who were Georgia residents to be subject to Georgia income tax on all income regardless of the source or where earned, unless specifically exempt by Georgia law. The specific instructions in question from the 2015 tax instructions booklet appear below:

> Residents. Military personnel whose home of record is Georgia or who are otherwise residents of Georgia are subject to Georgia income tax on all income regardless of the source or where earned, unless specifically exempt by Georgia law.
>
> ...
>
> Nonresidents. Military personnel whose home of record is not Georgia **and who are not otherwise residents of Georgia** are only required to file a Georgia income tax return if they have earned income from Georgia sources other than military pay. https://dor.georgia.gov/it-511-individual-income-tax-booklet (2015) (emphasis added).

Under the 2015 instructions, the key words for our analysis are "and who are not otherwise residents of Georgia" under the subheading "Nonresidents." Even if Mr. McRae had a Home of

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other conditions are met. See O.C.G.A. § 48-7-27(a)(5)(D) [Effective until January 1, 2024].

Record that was not Georgia as Petitioners assert, Petitioners must also show that he was not a resident of Georgia during tax year 2015 in order to fall under the category of "nonresident" under the instructions. In response to Respondent's Statement of Material Facts, Petitioners stated that it was true that they, both Mr. and Mrs. McRae, were Georgia residents during tax years 2015 and 2019. See Pet. Resp. Br. at 4. Thus, as Georgia residents, Petitioners were required to include Mr. McRae's military retirement income in the computation of their Georgia taxable net income unless it was exempt by some other Georgia law.

The Georgia law allowing for military retirement income to be excluded from taxable income is provided for in the above referenced O.C.G.A. § 48-7-27(a)(5)(D). Mr. McRae's age during tax year 2015 is not in dispute; Mr. McRae was not 62 years old or older during tax year 2015. See Petitioners' Response Brief, December 19, 2022, p. 9. Due to Petitioners' refusal or inability to produce any evidence supporting their claim of disability, the Tribunal has adopted the presumption that Mr. McRae was not permanently and totally disabled, as defined under subsection (ii) of O.C.G.A. § 48-7-27(a)(5)(D), during tax year 2015. Thus, Petitioners have not shown that they have met the conditions required to exclude their military retirement income from their 2015 Georgia State Income Tax Return. Thus, the Department's Assessment for Tax Year 2015 is affirmed.

b) Tax Year 2019

For Tax Year 2019, Respondent argues that Petitioner's 2019 federal adjusted gross income on their Federal Income Tax transcript does not match the amount listed on their 2019 Georgia State Income Tax Return. Pursuant to O.C.G.A. § 48-7-27(a), "Georgia taxable net income of an individual shall be the taxpayer's federal adjusted gross income, as defined in the United States Internal Revenue Code of 1986, less [certain statutory deductions.]" Here, it appears that Petitioners, perhaps mistakenly, inserted their federal taxable income instead of their federal adjusted gross

income for line 8[2] of their Georgia return. See DOR Exhibit D, p. 2; DOR Exhibit H, p. 6. By using an artificially reduced federal adjusted gross income on their Georgia return, Petitioners improperly took federal deductions leading to an incorrect Georgia taxable income amount being placed on their Georgia return. Since Petitioners did not calculate their Georgia taxable income correctly, the Department's 2019 Assessment is affirmed.

CONCLUSION

For the foregoing reasons, Respondent's Motion for Summary Judgment is **GRANTED**, and the Department's 2015 Notice of State Tax Execution, letter ID L0882935920, as well as the Department's 2015 and 2019 Official Assessment and Demand for Payment, letter ID's L2136150736 and L0855882032, respectively, are upheld.

SO ORDERED, this 9th day of August, 2023.

James E. O'Neal

LAWRENCE E. O'NEAL, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL

[2] Line 8 on Georgia State Income Tax Returns calls for federal adjusted gross income.