

**BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA**

EMILY A. BISCHOFF,)	
)	
Appellant)	DOCKET NO.: IT-2007-5
)	
-v-)	FACTUAL BACKGROUND,
)	CONCLUSIONS OF LAW,
THE DEPARTMENT OF REVENUE)	ORDER AND OPPORTUNITY
OF THE STATE OF MONTANA)	FOR JUDICIAL REVIEW
)	
Respondent.)	

Statement of the Case

Emily A. Bischoff (Appellant) filed a 2005 Montana Individual Income Tax Return as a part-year resident of Montana. The Department of Revenue (Department) audited her return for the part-year resident tax credit claimed for income taxes paid to another state, subsequently disallowed the credit, and issued an additional assessment. The Appellant pursued the appeal procedures available within the Department: an informal review and a proceeding before the Office of Dispute Resolution. The audit results were affirmed at each of these steps. On November 5, 2007, the Appellant appealed the Department's final decision to this Board which heard this matter *de novo*, on the written record.

Issue

The issue is whether the Department properly disallowed the tax credit the Appellant claimed on her 2005 Montana return for income taxes paid to another state.

Summary of Decision

Based on the evidence submitted, the Board affirms the decision of the Department of Revenue.

Principles of Law

1. Adjusted gross income for Montana income tax purposes is the taxpayer's federal adjusted gross income as defined in § 62, I.R.C. subject to certain state modifications to income. (Section 15-30-111, MCA).
2. For nonresident taxpayers, adjusted gross income includes the entire amount of adjusted gross income provided for in § 15-30-111, MCA. (Section 15-30-131, MCA).
3. A tax is imposed upon each nonresident . . . as if the nonresident were a resident during the entire tax year, multiplied by the ratio of Montana source income to total income from all sources. (Section 15-30-105(1)(a), MCA).
4. A resident of Montana is allowed a credit against the taxes imposed by Montana for income taxes imposed by and paid to another state on income taxable by Montana. (Section 15-30-124(1)(a), MCA).
5. If, in the opinion of the department, any return of a taxpayer is in any essential respect incorrect, it may revise the return. The amount of tax due under any return may be determined by the department within 5 years after the return was filed. For the purpose of this section, a tax return due and filed before the last day prescribed by law or rule is considered to be filed on the last day prescribed for filing. (Section 15-30-145(1) and (3), MCA).
6. A person who fails to pay a tax when due must be assessed a late payment penalty and interest. The penalty and interest accrue on the unpaid tax from the original due date of the return. (Section 15-1-216, MCA).
7. A person may appeal to the state tax appeal board a final decision of the department of revenue. The appeal is made by filing a complaint with the board within 30 days following receipt of notice of the department's final decision. (Sections 15-2-302(1) and (2), MCA).

Findings of Fact

Appellant's Montana Tax Return and Audit

1. The Appellant filed a Montana Individual Income Tax Return for 2005 as a part-year resident. (ODR FOF #1 adopted by the Department in the Department's Position Brief and uncontested by the Appellant).
2. On her Montana income tax return, the Appellant reported total resident and non-resident income for the year of \$31,051. After deductions and exemptions, her taxable income totaled \$24,176. The Montana tax on this amount totaled \$1,225. (Department's Exh. D).
3. The Appellant entered \$8,247 as her total Montana source income on Schedule IV (Non-resident/Part-year Resident Tax), line 16. On the same form, she entered \$31,051 as her total income from all sources (line 17) and calculated the Montana share of her income (line 18) as 0.2656 of her total income for the year (\$8,247 divided by \$31,051). (Department's Exh. D)
4. Also on Schedule IV, the Appellant calculated her part-year resident tax (lines 19 and 20) as \$325 (\$1225 multiplied by 0.2656). (Department's Exh. D).
5. The Appellant's Montana return further included Schedule VII (Credit for an Income Tax Liability Paid to Another State . . . Part-year resident only). On that form, she entered some of her non-Montana source income (line 1) and calculated a \$325 credit "for an income tax paid to another state" (line 10). This \$325 credit was entered on line 48a of the Appellant's Montana Individual Income Tax Return and effectively eliminated any tax due to the State of Montana. (Department's Exh. D).
6. A credit is allowed against Montana income tax for income taxes paid to another state on income that is also taxable by Montana. (Department's Position Brief, p. 2).

7. The Department selected the Appellant's tax return for review of the \$325 part-year resident tax credit claimed. As a result of the review, the credit was disallowed and tax in the amount of \$325 was assessed to the Appellant. (Department's Exh. E).
8. Interest and late payment penalties were assessed on the amount of tax due and not paid. The Department requested payment within 30 days. (Department's Exh. E).
9. Both the letter from the Department's Auditor and the Department's Statement of Account (SOA) indicate that the taxpayer may file a written objection to the deficiency assessment within 30 days from the date on the SOA. Neither the Auditor's letter nor the Department's SOA mentions the possibility of paying the amounts due under protest. (Department's Exh. E).
10. The Appellant's father, Louis M. Bischoff, on behalf of the Appellant, objected to the Department's assessment and pursued an appeal. (L.M. Bischoff letter of November 5, 2007).

Appellant's Georgia Tax Return

11. The Appellant also filed a Georgia Individual Income Tax Return for 2005, showing residency in Georgia from May 10, 2005, to December 31, 2005. (ODR FOF #1).
12. On her Georgia return, the Appellant entered \$31,051.04 as federal income after Georgia adjustments; \$8,246.59 as Income not Taxable to Georgia; and \$22,804.45 as Georgia Income. (ODR FOF #1).

Typographical Errors on Montana Form

13. The instruction for line 1 on the Schedule VII form used by the Appellant contains a typographical error. The instruction directs the taxpayer to "[e]nter your income taxable to another state . . . that is included in Montana source income on . . . Schedule IV, line **17**, total Montana source income." (Emphasis

added). Line 3 of the Schedule provides a similar instruction, directing the taxpayer to line **17** of Schedule IV for total Montana source income. (Emphasis added). (Department's Exh. D). Line 17 on Schedule IV, however, is used for total income from **all** sources" (emphasis added) and it is line **16** which is used for total **Montana** source income. (Department's Exh. D).

14. The Board takes official notice of the Department's website which notes a "Correction to Schedule VII, line 1 and 3, 11-27-05". The correction changed "line 17" to "line 16" on Schedule VII.

Board Discussion and Conclusions of Law

The issue to be decided in this matter is whether the Department erred in disallowing the \$325 tax credit the Appellant claimed for income taxes paid to another state.

The State of Montana allows a credit for a tax paid to another state when the income on which the tax was paid is also taxable to Montana. (Section 15-30-124, MCA). In essence, the same income must be taxed by both states before the credit can be claimed on an individual's Montana tax return. That is not the case here.

The Appellant's Georgia tax return identifies \$8,246.59 as "Income **not** Taxable to Georgia." (Emphasis added). The amount of Montana source income entered on the Appellant's Montana tax return, Schedule IV, is \$8,247. The state of Georgia did not tax the Appellant's Montana source income. As a result, the Appellant cannot claim a credit for taxes paid to another state on income also taxed by Montana. Her Montana source income was not taxed by Georgia; it was only taxed by Montana.

Montana law directs that a part-year resident's adjusted gross income is to include the entire amount of that person's federal adjusted gross income (after additions and reductions specific to Montana). (*See* Sections 15-30-131 and 15-30-111, MCA). Accordingly, the Appellant was required to include on her return both

her Montana source income and all non-Montana source income. After adjustments to determine the amount of taxable income, the Appellant was required to calculate the tax due (\$1,225) as though the total amount of taxable income would be taxed by Montana. The actual tax due to Montana (\$325), however, was calculated as a pro rated share of the total tax and was based on the same proportion (0.2656, derived on Schedule IV) which her Montana source income bore to her total income (\$31,051).

The Appellant's father argues that the Montana tax return "uses Georgia income to increase the taxable amount in Montana and thereby increase the Montana tax bracket and subsequent tax." (Bischoff letter of November 5, 2007). Even if that were true, it is the approach specified in Montana law and is, therefore, beyond the authority of the Department to change.

The Appellant filed a timely appeal in this case. The Department has assessed late payment penalties and interest which accrue from the original due date of the return until the tax is paid. (See Section 15-1-216, MCA). The letter from the Department's Auditor and the Department's Statement of Account both specify that the Appellant may, within 30 days, object to the amount owing. The same documents request payment of the amount due within 30 days. Neither document makes clear that penalty and interest will continue to accrue until the amount due is paid in full, even if the Appellant files a written objection to the assessment. Neither document mentions the alternative of paying the amount due under protest to stop the accrual of penalty and interest. The Department failed to bring forward any evidence demonstrating an effort on their part to inform the Appellant of the option of paying under protest or to notify her that penalty and interest would continue to accrue whether or not an appeal was filed. In addition, the Department's typographical error on the Schedule used by the Appellant to calculate a credit for a tax paid to another state increases the potential for taxpayer confusion in this case. Although the

ORDER

It is therefore ordered by the State Tax Appeal Board of the State of Montana that the tax assessed by the Department is due and owing. Accrual of the late payment penalty and interest is suspended from November 8, 2007, when this appeal reached the Board, until 30 days from the entry of this order. Penalty and interest will continue to accrue after that date unless the total amount due has been paid in full.

Dated this 21st day of March, 2008.

By Order of the
State Tax Appeal Board

KAREN E. POWELL, Chairwoman

SUE BARTLETT, Board Member

DOUGLAS A. KAERCHER, Board Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.