

CHAPTER 35. TAX EXAMINATIONS AND ASSESSMENTS

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§ 35.1. Tax examinations and assessments.

(a) *Examinations.* Tax examinations shall conform with the following:

(1) *Verification of returns, documents, and transactions.* The Department, by its authorized agents, has the power to enter upon the premises of a taxpayer or supposed taxpayer, and of an agent, representative, employe, or accountant of the person, or the custodian of the person's records, for the purpose of making inspections, examinations, and verifications of books, records, papers, and other documents, to ascertain and assess tax imposed by the act. For this purpose, taxpayers are required to admit the Department and its authorized agents upon the premises, and to provide the Department and its agents with the necessary means, facilities and opportunities to make inspections, examinations, and verifications.

(2) *Audits.* Audits shall be conducted in accordance with Chapter 8a (relating to enforcement).

(3) *Examination under oath and compulsory production of documents.* The Department by its authorized agents may also, upon reasonable notice, examine a person under oath concerning taxable sales or use by a taxpayer, or concerning another matter which relates to the enforcement or administration of the act. For this purpose, the Department has the power to compel, by legal process, the production of books, papers, records, or other documents, and the attendance of persons, whether as parties or witnesses, whom it believes to have knowledge of the matters. Hearings and examinations for this purpose are conducted in the manner provided by relevant provisions of the Fiscal Code (72 P. S. §§ 1—1855).

(4) *Retention of records.* Records required to be maintained under the TRC or § 34.2 (relating to keeping of records) shall be retained for a period not less than 3 years from the end of the calendar year to which they relate.

(5) *Records of nonresidents.* A nonresident who maintains records under § 34.2 is required to maintain, keep and retain the records at all times at a place within this Commonwealth, unless authorized by the Department in writing to maintain the records at a place outside this Commonwealth. Authorization to maintain records outside this Commonwealth is conditioned upon agreement to and compliance with those requirements which the Department may impose, including the assumption by the nonresident of an obligation to pay the reasonable expense of examination by the Department or its agents of records located outside this Commonwealth.

(6) *Effect of noncompliance.* Criminal and other sanctions imposed for failure to register or maintain required records or permit examination of relevant materials or persons are discussed in §§ 35.2 (relating to interest, additions, penalties, crimes, and offenses) and 34.1 (relating to registration).

(b) *Assessments.* Tax assessments shall conform with the following:

(1) *Underpayment of tax.* Within a reasonable time after a return is filed, the Department will examine it and, if the return shows a greater tax due or collected than the amount of tax remitted with the return, the Department will issue an assessment for the difference, with an addition of 3.0% of the difference, which shall be paid to the Department within 10 days after a notice of the assessment has been mailed to the taxpayer. If the assessment is not paid within 10 days, there shall be added thereto and paid to the Department an additional 3.0% of the difference for each month during which the assessment remains unpaid, but the total of additions may not exceed 18% of the difference shown on the assessment.

(2) *Understatement of tax.* If the Department determines that the return of a taxpayer understates the amount of tax due, it will determine the proper amount and ascertain the difference between the amount of tax shown in the return and the amount determined. The difference is referred to as the deficiency. A notice of assessment for the deficiency and the reasons therefor will be sent to the taxpayer. The deficiency shall be paid to the Department within 30 days after a notice of the assessment has been mailed to the taxpayer.

(3) *Failure to file return.* If a taxpayer fails to file a return required by Article II of the TRC (72 P. S. §§ 7201—7282), the Department may make an estimated assessment, based on information available, of the proper amount of tax owing by the taxpayer. A notice of assessment in the estimated amount will be sent to the taxpayer. The tax shall be paid within 30 days after a notice of estimated assessment has been mailed to the taxpayer.

(4) *Authority to establish effective rates by business classification.* The Department is authorized to make the studies necessary to compute effective rates by business classification, based upon the ratio between the tax required to be collected and taxable sales and to use the rates in arriving at the apparent tax liability of a taxpayer.

(5) *Interest, additions, penalties, and crimes.* When required, interest, additions, penalties or criminal sanctions will be imposed under the TRC. See sections 265—268 of the TRC (72 P. S. §§ 7265—7268) and § 35.2 (relating to interest, additions, penalties, and crimes and offenses).

(6) *Appeal.* An assessment based upon this subsection will be binding upon the taxpayer unless the assessment is altered on appeal to the Board of Appeals, Board of Finance and Revenue or the court.

(c) *Period covered by assessment.* The period covered by an assessment shall conform to the following:

(1) *Underpayment and understatement.* Where a return has been filed and the amount of tax is due to either underpayment of tax or understatement of tax, the amount of tax thus imposed shall be assessed within 3 years after the date the return was filed or the end of the year in which the tax liability arose, whichever occurs last. The assessment may be made any time during the period even if the Department has made previous assessments against the taxpayer for the year in question, or for a part of the year. No credit may be given for a penalty previously assessed or paid.

(2) *Failure to file return.* If a return is not filed, the amount of tax due may be assessed and collected at any time as to taxable transactions not reported.

(3) *False or fraudulent return.* Where the taxpayer willfully files a false or fraudulent return with intent to evade the tax imposed by the act, the amount of tax due may be assessed and collected at any time.

(4) *Extension of limitation.* If the taxpayer has consented, in writing, before the expiration of the period prescribed for the issuing of an assessment of tax, that the period be extended, the amount of tax due may be assessed any time within the extended time. The extended period may be extended further by subsequent consents, in writing, made before the expiration of the extended time.

(d) *Notice of assessment.* Notice of assessment shall conform with the following:

(1) *Issuance.* Upon making an assessment, the Department will issue a notice of it and will serve the notice upon the person assessed.

(2) *Contents.* The notice will set forth the reasons for the assessment, the amount and date thereof, the place where and the time within which the person assessed is required by law to petition for review, and will notify the person that upon the failure to do so, the assessment will be binding.

(3) *Service.* Service of notice shall conform with the following:

(i) Except as provided in this paragraph, as a prerequisite to a valid determination of personal liability, notice shall be served upon the person assessed by sending a copy of the notice by first-class mail to him at the following places:

(A) At the last known business or home post office address of the person.

(B) At the address as the person may have designated, in writing, as the address at which the person desired notice to be sent.

(ii) If the person assessed has no post office address within this Commonwealth known to the Department, notice shall be served upon the person by sending a copy of the notice by registered mail, return receipt requested, to the person assessed at the last known address of the person's principal place of business, or at another address or in another manner which is reasonably calculated to give the person actual notice of the assessment. This section does not diminish or postpone the right of the Commonwealth to

secure a claim it may have with respect to property of the person assessed which is located within this Commonwealth.

Authority

The provisions of this § 35.1 issued under section 270 of the Tax Reform Code of 1971 (72 P. S. § 7270).

Source

The provision of this § 35.1 amended through October 11, 1985, effective October 12, 1985, 15 Pa.B. 3651; amended March 27, 1998, effective March 28, 1998, 28 Pa.B. 1522; corrected April 17, 1998, effective March 28, 1998, 28 Pa.B. 1836. Immediately preceding text appears at serial pages (102547) to (102550).

Notes of Decisions

The regulation governing service of notice requires the Department to mail the essential notice to such address as a person may have designated in writing, even if that address is out-of-State, as well as mailing to the mailing address in Pennsylvania. *Evergreen Helicopters, Inc. v. Commonwealth*, 516 A.2d 124 (Pa. Cmwlth. 1986).

§ 35.2. Interest, additions, penalties, crimes and offenses.

(a) *Interest.* Interest shall be imposed in conformance with the following:

(1) *Rate.* Effective January 1, 1982, the annual rate of interest imposed on tax due the Commonwealth is established by section 806 of the FC (72 P. S. § 806). See 61 Pa. Code §§ 4.1—4.11 (relating to interest).

(2) *Late payment.* If an amount of tax imposed by the TRC is not paid on or before the last date prescribed for payment, interest shall be paid under section 806 of the FC. The last date prescribed for payment shall be determined under § 34.3 (relating to tax returns) without regard to an extension of time for payment. In the case of an amount assessed as a deficiency or as an estimated assessment, the date prescribed for payment shall be 30 days after notice of the assessment.

(3) *Assessment.* If the Department assesses a tax, there shall be added to the amount of the deficiency interest, calculated under section 806 of the FC, for each month or fraction thereof from the date payment of the tax was due to the date of notice of the assessment.

(b) *Additions.* Additions shall be imposed in conformance with the following:

(1) *Failure to file return.* In the case of failure to file a return required on the date prescribed therefor, determined with regard to an extension of time for filing, there shall be added to the amount of tax actually due 5.0% of the amount of such tax if the failure to file a proper return is for not more than 1 month, with an additional 5.0% for an additional month or fraction thereof dur-

ing which the failure continues, not exceeding 25% in the aggregate. In every case, at least \$2.00 shall be added.

(2) *Underpayment of tax.* If a return filed with the Department shows a greater tax due or collected than the amount of tax remitted with the return, the Department will issue an assessment for the difference, together with an addition of 3.0% of the difference, which shall be paid to the Department within 10 days after a notice of the assessment has been mailed to the taxpayer. If the assessment is not paid within 10 days, there shall be added thereto, and paid to the Department, an additional 3.0% of the difference for each month thereof during which the assessment remains unpaid, but the total of all these additions may not exceed 18% of the difference shown on the assessment.

(3) *Understatement of tax.* If a return filed with the Department understates the amount of tax due, there shall be added to the assessment an addition of 5.0% of the understatement. Where the understatement is in excess of 50% there shall be added to the foregoing 5.0% addition, a further 5.0% of the understatement for each month or fraction thereof that the understatement is outstanding. This further addition may not exceed 25% of the understatement.

(4) *Uncollectible checks.* Whenever a check issued in payment of a tax or for another purpose is returned to the Department as uncollectible, to cover the cost of its collection a fee of 10% of the face amount thereof, plus protest fees, will be charged to the person presenting the check to the Department. The additions imposed hereby may not exceed \$200 nor be less than \$10. The additions shall be added to interest, additions or penalties otherwise due under the TRC.

(c) *Penalties.* Intentional failure on the part of a party to a transaction whether as vendor, purchaser or user to pay, collect or remit to the Department the full tax due under this article may subject the taxpayer to a 50% penalty unless the taxpayer makes a full, accurate and complete good faith disclosure of the occurrence of the transaction. The disclosure shall be made to the Department as an addition to the return for the period during which the transaction occurred. In addition, a person who willfully attempts in any manner to advise or assist a taxpayer to evade or defeat the tax shall be liable for the 50% penalty. An act or omission which occurs after a person has knowledge that an act or omission is not in conformity with this article is presumed to be an intentional act or omission. The presumption exists that every taxpayer is familiar with the provisions of the Code and regulations and rulings. Where an issue of fact is raised in a proceeding for reassessment or refund with respect to whether a return is fraudulent, the burden of proof with respect to an issue is on the Department.

(d) *Crimes and offenses.* The following shall constitute crimes and offenses:

(1) *Crimes under the TRC.* Crimes under the TRC are as follows:

(i) *Fraudulent return.* Any person who, with intent to defraud the Commonwealth, shall willfully make or cause to be made a false return shall be

guilty of a misdemeanor and upon conviction thereof, shall be sentenced to pay a fine not exceeding \$2,000 or undergo imprisonment not exceeding 3 years, or both.

(ii) *Misdemeanor.* A fine not exceeding \$1,000 or imprisonment not exceeding one year, or both, may be imposed upon conviction of any of the following:

(A) A person who advertises or holds out to the public that the tax will be absorbed by the person, not added to the purchase price or, if added, refunded other than when the property is returned to the vendor.

(B) A person who willfully fails or refuses to collect and remit the tax to the Department.

(C) A person who willfully fails, neglects or refuses to file a return or report required to be filed.

(D) A taxpayer who refuses to pay any tax, interest, additions or penalties imposed.

(E) A taxpayer who willfully fails to preserve his books, papers and records as directed by the Department.

(F) A person who refuses to permit the Department or its agents to examine his books, records or papers.

(G) A person who knowingly makes an incomplete, false or fraudulent return or report.

(H) A person who does anything to prevent the full disclosure of the amount or character of taxable sales, purchases or use of the property.

(I) A person who provides a person with a false statement as to the payment of the tax.

(J) A person who makes or issues a false or fraudulent exemption certificate.

(iii) *Summary offense.* A fine of not less than \$100 nor more than \$300, and in default thereof, imprisonment of not less than 5 days nor more than 30 days, shall be imposed upon conviction of: a person who maintains a place of business in this Commonwealth for the purpose of selling or leasing services or tangible personal property, the sale or use of which is subject to tax, without having first been licensed by the Department.

(2) *Crimes under the Penal and Crimes Code.* Crimes under the Penal and Crimes Code (18 P. S. § 4823) shall be as follows:

(i) *Embezzlement*—In addition to the offenses already set forth in this subsection, any person who, on or before June 5, 1973, collected and converted or misappropriated the tax may be guilty of embezzlement under the provisions of the Penal Code of 1939 (18 P. S. § 4823). Reference should be made to *Commonwealth v. Shafer*, 414 Pa. 613 (1964).

(ii) *Misapplication of entrusted property and property of Government or financial institutions.* In addition to the offenses already set forth in this subsection, any person who, on or after June 6, 1973, collects and converts or

misappropriates the tax may be guilty of misapplication of entrusted property and property of government or financial institutions under the provisions of 18 Pa.C.S. § 4113 (relating to misapplication of entrusted property and property of government or financial institutions).

(iii) *Theft*. In addition to the offenses already set forth in this subsection, any person who, on or after June 6, 1973, collects and converts or misappropriates the tax may be guilty of theft under the provisions of 18 Pa.C.S. §§ 3921 or 3927 (relating to theft by unlawful taking or disposition; and theft by failure to make required disposition of funds required).

Authority

The provisions of this § 35.2 amended under sections 248.2 and 270 of the Tax Reform Code of 1971 (72 P. S. §§ 7248.2 and 7270).

Source

The provisions of this § 35.2 amended August 20, 1976, effective August 21, 1976, 6 Pa.B. 1988; amended April 24, 1987, effective April 25, 1987, 17 Pa.B. 1665. Immediately preceding text appears at serial pages (115259) to (115260) and (102553) to (102554).

Cross References

This section cited in 61 Pa. Code § 35.1 (relating to tax examinations and assessments); and 61 Pa. Code § 46.7 (relating to nonresident contractors).

§ 35.3. Lien for taxes.

(a) *Lien imposed*. If a person liable to pay a tax, interest, addition or penalty neglects or refuses to pay the same after demand, upon entry of record by the prothonotary of the county where the property is situated, the amount shall be a lien in favor of the Commonwealth against real property and personal property—except merchandise regularly sold in the course of the taxpayer's business—of the person.

(b) *Priority and effect of lien*. The Commonwealth will have priority from the date of entry of the lien and shall be fully paid and satisfied out of the judicial sale of the property subject thereto before any subsequent obligation attaching to the property. However, the Commonwealth lien is subject to mortgages or other liens existing and recorded at the time of the entry of the tax lien, and local real property taxes and municipal claims against real property. In the case of a judicial sale upon a claim over which the tax lien has priority, the sale shall discharge the tax lien only to the extent that the proceeds are applied to its payment and the lien shall continue in full force as to the balance remaining unpaid. The lien shall continue for 5 years from date of entry and may be revived in the manner now or hereafter provided for renewal of judgments or as may be provided in the FC (72 P. S. §§ 1—1855).

(c) *Priority of tax*. In the distribution, voluntary or compulsory, in receivership, insolvency, assignment for benefit of creditors or otherwise of the property

or estate of a person, taxes imposed by the act which are due and unpaid will be paid from the first money available for distribution in priority to unsecured claims and junior lien claims except insofar as the laws of the United States may give a prior claim to the Federal Government. However, in the distribution of a decedent's estate or bankruptcy, the priority of the tax claim is controlled by the Fiduciaries Act and 11 U.S.C. §§ 101—151326, known as the Federal Bankruptcy Act. A person charged with the administration or distribution of the property who violates this chapter will be personally liable for taxes imposed by the act which are accrued and unpaid and are chargeable against the person whose property or estate is being administered or distributed.

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