DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. ARIZONA DEPARTMENT OF REVENUE, Plaintiff/Appellee, v. CLARE L. READING and JAMES L. READING, individually and as husband and wife, Defendants/Appellants.	No. 1 CA-TX 08-0011 DEPARTMENT T **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Arizona Tax Court

Cause No. TX 2007-000479

The Honorable Thomas Dunevant, III, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Marc A. D'Amore, Assistant Attorney General
David J. Dir, Assistant Attorney General
Miral A. Sigurani, Assistant Attorney General
Stephen D. Ball, Assistant Attorneys General
Attorneys for Plaintiff/Appellee

Clare L. Reading — Mesa
In Propria Persona

James L. Reading — Mesa
In Propria Persona

J O H N S E N, Judge

¶1 Clare L. Reading and James L. Reading (collectively "Taxpayers") appeal from a summary judgment holding that the Arizona income taxes assessed against them for the 1994 and 1995 tax years had become final. For the reasons that follow, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 During tax years 1994 and 1995, Clare Reading failed to file Arizona Form 140, Resident Personal Income Tax Return. On January 2, 2003, the Arizona Department of Revenue (the "Department") issued Notices of Proposed Assessment ("Notices") for these tax years.

¶3 Clare Reading did not protest the proposed assessments. Rather, she sent a letter dated January 9, 2003, to the director of the Department, which stated in relevant part:

> On January 6, 2003 your agent, Jules Wallace, mailed two pieces of correspondence to me containing frightening threats that if I did not respond as of April 2, 2003 "Collection Activity" would commence.
>
> These threatening letters cannot be responded to until the actual, signed (under penalty of perjury per 26 USC §301.6203.1.3 as adopted by the State of Arizona via ARS Title 43), dated Assessment(s) upon which these threats are based can be examined.

> Time is of the essence. Please send them (it) . . . to: [Clare Reading's address].

The Department did not respond until April 25, 2003, when it sent a letter stating that because no protest had been filed, the taxes were due. Taxpayers did not pay the taxes, penalties or interest due for the 1994 and 1995 tax years.

¶4 On November 27, 2007, the Department sued Taxpayers for the $6,445.38 assessment, plus penalties and interest. Taxpayers answered, and the Department moved for summary judgment. After Taxpayers' response was filed, their counsel withdrew. The tax court granted summary judgment to the Department in an unsigned minute entry. Because it concluded Taxpayers had failed to file a proper appeal, the court did not reach the merits of Taxpayers' arguments. *See* Ariz. Rev. Stat. ("A.R.S.") section 42-1251(B) (2006).

¶5 Taxpayers filed a series of unsuccessful motions, along with related memoranda and forms of order, primarily addressing the merits of their defenses. In addition, Taxpayers filed a Motion For New Trial; Amendment of Judgment on July 2, 2008, which the court ultimately denied after full briefing. The court then entered judgment and denied Taxpayers' ensuing Motion For Reconsideration And [To] Vacate Order Granting Summary Judgment. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶6 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). This court reviews the tax court's grant of summary judgment *de novo*. *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995). When the material facts are undisputed, we determine only if the court correctly applied the law to those facts. *In re U.S. Currency in Amount of $26,980.00*, 193 Ariz. 427, 429, ¶ 5, 973 P.2d 1184, 1186 (App. 1998).

¶7 Under A.R.S. § 42-1251(A), a taxpayer may file a petition for hearing, correction or redetermination within 90 days from the Department's mailing of notices of proposed assessments for individual income taxes. Pursuant to A.R.S. § 42-1251(B):

> If the taxpayer does not file a petition for hearing, correction or redetermination within the period provided by this section, the amount determined to be due becomes final at the expiration of the period. The taxpayer is deemed to have waived and abandoned the right to question the amount determined to be due, unless the taxpayer pays the total deficiency assessment, including interest and penalties. The taxpayer may then file a claim for refund pursuant to § 42-1118 within six months of

> payment of the deficiency assessment or within the time limits prescribed by § 42-1106, whichever period expires later.

¶8 It is undisputed that the Department mailed the Notices on January 2, 2003, and Taxpayers received them. Taxpayers therefore had only until April 2, 2003, to petition the Department. *See* A.R.S. § 42-1251(A), (B).

¶9 According to Taxpayers, however, they were entitled to delay filing their petition until the Department responded to their letter inquiry. But no authority extends the 90-day protest period based upon a taxpayer's submission of written questions or any failure of the Department to respond to such questions. Because Taxpayers failed to file a petition protesting the proposed assessments within 90 days, they are deemed to have waived and abandoned the right to question the amount determined to be due.

¶10 When a taxpayer does not appeal an assessment through the administrative process, it becomes final as a matter of law. *See* A.R.S. § 42-1108(B), (C) (2006). In construing the predecessor version of A.R.S. § 42-1251(A), former A.R.S. § 42-122(A), this court held that parties "must scrupulously follow the statutory procedures" and "[i]f they fail to fully utilize all their administrative remedies, the superior court lacks jurisdiction to consider their claim." *Estate of Bohn v.*

Waddell, 174 Ariz. 239, 245-46, 848 P.2d 324, 330-31 (App. 1992) (citations omitted); *see Hamilton v. State*, 186 Ariz. 590, 593-94, 925 P.2d 731, 734-35 (App. 1996) (same); *see also Mountain View Pioneer Hosp. v. Employment Sec. Comm'n*, 107 Ariz. 81, 85, 482 P.2d 448, 452 (1971) ("When a party fails to exhaust all his administrative remedies he is thereby precluded from asserting his right to judicial review and the trial court is without jurisdiction to entertain such action.").

¶11 Had Taxpayers complied with A.R.S. § 42-1251(A) and (B), they would have been entitled to raise the merits of their claims in an administrative appeal and, following that, in an appeal to the tax court, if necessary. *See* A.R.S. §§ 42-1251, -1253 to -1254 (2006), 42-1108.[1] Their failure to do so prevents this court from considering their arguments and requires us to affirm the tax court's grant of summary judgment. *See* A.R.S. § 42-1108(B).[2]

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[1] Although section 42-1254 was amended after the time relevant to this appeal, the revisions are immaterial to our disposition and we cite to the current published version of the statute.

[2] Taxpayers argue that the assessments were improper because, *inter alia*, pay received for the performance of catastrophic insurance adjusting is excluded from gross income for purposes of federal and state taxation. We find no support for that proposition or for the notion that income taxes may not be assessed on such income. *See*, *e.g.*, *Tanque Verde Enterprises v. City of Tucson*, 142 Ariz. 536, 541, 691 P.2d 302, 307 (1984)

CONCLUSION

¶12 We affirm the grant of summary judgment to the Department and deny Taxpayers' request for attorney's fees on appeal.

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DIANE M. JOHNSEN, Judge

CONCURRING:

_____
PETER B. SWANN, Presiding Judge

_____
PATRICK IRVINE, Judge

(due process clause generally does not limit state or federal taxing power).