IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Shaker, Petitioner	:	
v.	:	No. 932 F.R. 2008
	:	Submitted: June 6, 2012
Commonwealth of Pennsylvania, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: August 16, 2012**

Petitioner Thomas Shaker (Shaker), pursuant to Pa. R.A.P. 1571(i), filed exceptions to this Court's decision in *Shaker v. Commonwealth*, (Pa. Cmwlth. No. 932 F.R. 2008, filed January 3, 2012) (*Shaker I*). The dispute here focuses on the application of the Pennsylvania personal income tax (PIT)[1] to a nonresident,

[1] Pursuant to Section 302 of the Tax Reform Code of 1971 (Code), Act of March 4, 1971, P.L. 6, added by the Act of August 4, 1991, P.L. 97, *as amended*, 72 P.S. § 7302, Pennsylvania residents and nonresidents are obligated to remit a tax on each dollar of income at a rate of 3.07%. For residents, that percentage applies to all income received in a taxable year. For nonresidents, the percentage applies only to income from sources within the Commonwealth. Section 302 of the Code provides, in full, for the imposition of the PIT as follows:

(Footnote continued on next page…)

who invested as a limited partner in a Connecticut limited partnership, which owned a building in the City of Pittsburgh, which went into foreclosure.

Shaker initially petitioned this Court for review of a Board of Finance and Revenue (Board) Order, which confirmed a decision by the Department of Revenue (Revenue) imposing PIT on Shaker, a resident of New York, for "income" from the foreclosure of a commercial property in the City of Pittsburgh (Property) in 2005. 600 Grant Street Associates Limited Partnership (Partnership), organized under Connecticut law, purchased the Property for approximately $360 million, $308 million of which the Partnership financed with a non-recourse Purchase Money Mortgage Note (PMM Note) secured only by the Property. Interest on the PMM Note accrued on a monthly basis at a rate of 14.55%, and, if monthly accrued interest exceeded the net operating income of the Partnership, accrued but unpaid interest would be deferred and compounded on an annual basis.

Shaker purchased a limited partnership interest (one quarter unit) in the Partnership on or about December 21, 1984, for $37,250, although the Partnership returned a portion of Shaker's capital contribution in the amount of

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(continued…)

> (a) Every resident individual, estate or trust shall be subject to, and shall pay for the privilege of receiving each of the *classes of income hereinafter enumerated in section 303*, a tax upon each dollar of income received by that resident during that resident's taxable year at the rate of three and seven hundredths per cent.
>
> (b) Every nonresident individual, estate or trust shall be subject to, and shall pay for the privilege of receiving each of the *classes of income hereinafter enumerated in section 303* from sources within this Commonwealth, a tax upon each dollar of income received by that nonresident during that nonresident's taxable year at the rate of three and seven hundredths per cent.

(Emphasis added.)

$654 in 1986. Shaker was a passive investor in the Partnership. He never participated in the management of the Partnership or the Property. The Partnership incurred losses from operations for financial accounting, federal income tax, and PIT purposes every year of its existence. For PIT purposes, the Partnership allocated its annual losses from operations to each partner, including Shaker.

The lender foreclosed on the Property on June 30, 2005. At the date of foreclosure, the liability on the PMM Note had grown into a liability of more than $2.6 billion, of which only $308 million represented principal and approximately $2.32 billion represented accrued but unpaid interest.[2]

That same year, the Partnership terminated operations and liquidated. Shaker did not recover his capital investment in the Partnership at foreclosure or liquidation, and he did not receive any cash or other property upon liquidation of the Partnership.

In 2008, Revenue assessed Shaker PIT for calendar year 2005 (inclusive of penalties and interest) as a result of the foreclosure on the Property (Assessment). Shaker filed a petition for reassessment with Revenue's Board of Appeals (BOA), and BOA denied the appeal. Shaker appealed BOA's determination to the Board, which denied Shaker's request for relief from BOA's determination. Shaker then petitioned this Court for review.[3]

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[2] Neither the Partnership nor its individual partners received any cash or other property as a result of the foreclosure. The Partnership had used approximately $121,600,000 of the amount of the accrued but unpaid interest to offset its income from operations that would otherwise have been subject to PIT. Neither the Partnership nor Shaker derived any PIT benefit from the remainder.

[3] In *Miller v. Commonwealth of Pennsylvania*, 18 A.3d 395 (Pa. Cmwlth. 2011), we explained our role as follows:

(Footnote continued on next page…)

By opinion and order dated January 3, 2012, this Court affirmed the Board's order in part, concluding that Revenue appropriately applied Pennsylvania law in assessing Shaker PIT for the calendar year 2005. The majority vacated the decision, however, and remanded the matter to the Board for a recalculation of the amount of the Assessment, because the majority was unable to verify whether the amount assessed was correct, due to the lack of evidence available to determine the adjusted basis at the time of the foreclosure. In so doing, we incorporated by reference our majority opinion in *Marshall v. Commonwealth*, 41 A.3d 667 (Pa. Cmwlth. 2012) (*Marshall I*), and reached the same conclusions in *Shaker I* that we reached in *Marshall I*.

Thereafter, Shaker filed exceptions, essentially advancing each and every argument previously presented to the Court. Shaker's exceptions may be summarized as challenging the majority's opinion in *Shaker I*, as expounded in *Marshall I*, as follows: (1) challenging the conclusion that Shaker had sufficient minimum contacts; (2) challenging the conclusion that Shaker waived the

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(continued…)

> In tax appeals from the Board of Finance and Revenue, this Court functions as a trial court, and exceptions filed to its final order have the effect of an order granting reconsideration. *Consolidated Rail Corp. v. Commonwealth*, 679 A.2d 303, 304 (Pa. Cmwlth. 1996) (citing Pa. R.A.P. 1571(i)) ("Any party may file exceptions to an initial determination by the court under this rule within 30 days after the entry of the order to which exception is taken."). This Court reviews de novo the determinations of the Board. *Kelleher v. Commonwealth*, 704 A.2d 729, 731 (Pa. Cmwlth. 1997). Stipulations of fact are binding upon both the parties and the Court. *Id.* However, this Court may draw its own legal conclusions. *Id.* (citing Pa. R.A.P. 1571). The issues presented in this case pose questions of statutory construction, for which our review is plenary. *Malt Beverages Distributors Association v. Pennsylvania Liquor Control Board*, 918 A.2d 171, 175 (Pa. Cmwlth. 2007), *affirmed*, 601 Pa. 449, 974 A.2d 1144 (2009).

Miller, 18 A.3d at 398 n.5.

Commerce Clause argument; (3) challenging the application of the language in Section 103.13 of the Regulations, relating to "conversion of property into cash or other property;" (4) challenging the interpretation of Section 103.13 of Revenue's Regulations (Regulations), 61 Pa. Code § 103.13, to include the outstanding purchase money mortgage within the amount realized; (5) challenging the conclusion that *Commonwealth v. Rigling*, 409 A.2d 936 (Pa. Cmwlth. 1980), and *Commonwealth v. Columbia Steel & Shafting Co.*, 83 Pa. D. & C. 326 (Dauphin 1951), *exceptions dismissed*, 62 Dauph. 296 (C.P. Dauphin Pa. 1952), do not compel a different result; (6) challenging the Court's deference to Revenue's position as to the applicability of the tax benefit rule; (7) challenging the conclusion that *CIR v. Tufts*, 461 U.S. 300 (1983), and *Allan v. Commissioner of Internal Revenue*, 856 F.2d 1169 (8th Cir. 1988), do not require application of the tax benefit rule to exclude accrued but unpaid interest for which no tax benefit was received; (8) challenging the conclusion that application of the tax benefit rule to calculation of the amount realized would result in prohibited net operating losses and/or cross-class deduction; (9) challenging the conclusion that the PIT applied to resident taxpayers in the same manner that it applied to non-resident taxpayers; (10) challenging Revenue's reliance on Tax Bulletin 2005-02 to reach the conclusion that application of the PIT did not violate the United States or Pennsylvania Constitutions; (11) challenging the decision to remand the matter for purposes of recalculating the PIT; (12) challenging the majority's "failure to decide the issue of the first tax year to which the minimum depreciation provisions of Section 303(a.2)" of the Code are applicable; and (13) challenging the majority opinion's affirmance of the order of the Board.

This Court adequately addressed all of the issues related to Shaker's exceptions in our opinion in *Marshall v. Commonwealth*, ___ A.3d ___ (Pa. Cmwlth., No. 933 F.R. 2008, filed August 16, 2012) (*Marshall II*). We incorporate that opinion by reference and reach the same conclusions in this case.

Accordingly, Shaker's exceptions to the majority opinion in *Shaker I* are overruled.

P. KEVIN BROBSON, Judge

Judge Simpson dissents.

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O R D E R

AND NOW, this 16th day of August, 2012, the exceptions filed by Petitioner Thomas Shaker to this Court's majority opinion and order in *Shaker v. Commonwealth*, (Pa. Cmwlth., No. 932 F.R. 2008, filed January 3, 2012) (*Shaker I*), are hereby OVERRULED. The order of the Board of Finance and Revenue (Board) in the above-captioned matter, dated December 19, 2008, is AFFIRMED IN PART. The amount of tax is VACATED and the matter is REMANDED to the Board for a recalculation of the amount of tax due in conformity with this Court's opinion in *Shaker I.*

Jurisdiction relinquished.

P. KEVIN BROBSON, Judge

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HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: August 16, 2012

I respectfully dissent for the reasons set forth in my dissenting opinion in Marshall v. Commonwealth, ___ A.3d ___ (Pa. Cmwlth., No. 933 F.R. 2008, filed August 16, 2012). I incorporate that opinion by reference and reach the same conclusions in this case.

PATRICIA A. McCULLOUGH, Judge