

OHIO BOARD OF TAX APPEALS

Landry M. Simmons,)	
)	
Appellant,)	CASE NO. 01-T-1046
)	
vs.)	(PERSONAL INCOME TAX)
)	
Thomas M. Zaino, Tax)	
Commissioner of Ohio,)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

For the Appellant -	Landry M. Simmons, <i>pro se</i> 12605 Brooklawn Avenue Cleveland, Ohio 44111
For the Appellee -	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General Taxation Section State Office Tower, 16 th Floor 30 East Broad Street Columbus, Ohio 43266-0410

ENTERED: February 15, 2002

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

The Board of Tax Appeals considers this matter pursuant to a “Motion to Dismiss Appeal” filed by counsel for the Tax Commissioner. The motion asks this Board to dismiss Mr. Simmons’ notice of appeal for the reason that it was not filed with the Tax Commissioner within sixty days after notice of the Tax Commissioner’s

final determination was given to Mr. Simmons. In addition to the motion to dismiss and the memorandum in support of the motion attached thereto, a hearing was held before the Board for the purpose of receiving additional evidence. The Commissioner was represented at the hearing by counsel, who submitted documents certified by the Commissioner to support the motion. Although notified of the hearing, Mr. Simmons did not appear.

R.C. 5717.02 sets forth the procedures required for bringing a proper appeal from a Final Determination of the Tax Commissioner:

“Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer ***

“Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service of the date of receipt recorded by the

authorized delivery service shall be treated as the date of filing.” (Emphasis added.)

The requirements of R.C. 5717.02 are legislatively mandated and must be strictly complied with before the subject matter jurisdiction of the Board of Tax Appeals may be invoked. *Clippard Instrument Laboratory, Inc. v. Lindley* (1977), 50 Ohio St.2d 121; *House of Good Shepard, Inc. v. Limbach* (1988), 37 Ohio St.3d 244; *American Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147. R.C. 5717.02 specifically requires that a notice of appeal be filed with *both* the Board of Tax Appeals and the Tax Commissioner within sixty days after notice of the Commissioner’s final determination is given. The failure to comply with this requirement will properly lead to a dismissal of the appeal. *Akron Standard Div. v. Lindley* (1984), 11 Ohio St.3d 10.

A review of the notice of appeal and the Commissioner’s certification establishes that the Commissioner issued a final determination in this matter on August 31, 2001, wherein he affirmed a personal income tax assessment issued to Mr. Simmons for the 1997 tax year. The determination was mailed, by certified mail, on September 28, 2001. Attachment B to the Commissioner’s certification contains a copy of the domestic return receipt used in the mailing, demonstrating both the mailing date and that the determination was signed for on October 1, 2001.

The purported notice of appeal was sent to this Board via U.S. regular mail and was filed with this Board under date of October 24, 2001. In his certified statement of January 22, 2002, the Commissioner states that a “diligent” search of the

Department of Taxation's records "discloses no filing in this Office of a notice of appeal to the Board of Tax Appeals from the final determination entered in the matter of Personal Income Tax, Assessment No. 200182-4520, by the Commissioner and issued to Landry M. Simmons ***."

Based upon the foregoing, we must conclude that Mr. Simmons failed to file a notice of appeal with the Tax Commissioner, as expressly required by R.C. 5717.02. Consequently, the Board of Tax Appeals is without jurisdiction to consider the notice of appeal.

Even if the notice of appeal had been filed timely, we would be constrained to affirm the Commissioner's determination. In his notice of appeal, Mr. Simmons raises as his sole specification of error his claim that the income tax in question was not paid "due to the fact that it was my past employer[s] negligence of not properly taking out enough state taxes." Mr. Simmons suggests that we should reverse the assessment because his employer failed to make the proper income tax withholding, as required by R.C. 5747.06. However, R.C. 5747.06(C) provides that the "failure of an employer to withhold tax as required by this section or to remit such tax as required by law does not relieve an employee from the liability for the tax." Whether there may be a remedy available to Mr. Simmons as to his employer is a question that lies beyond the scope of our review. Regardless, such circumstances do not preclude the Commissioner's assessing Mr. Simmons for the unpaid income tax liability. R.C. 5747.06(C). Cf. *Fitzgibbons v. Tracy* (Oct. 7, 1994), BTA No. 93-T-753, unreported.

In conclusion, as Mr. Simmons has failed to perfect an appeal to the Board of Tax Appeals, it is the decision and order of this Board that this matter must be, and the same hereby is, dismissed.

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