

OHIO BOARD OF TAX APPEALS

Glenn and Audrey Altschuld,)	
)	
Appellants,)	CASE NO. 2002-N-736
)	
vs.)	(PERSONAL INCOME TAX)
)	
Thomas M. Zaino, Tax)	DECISION AND ORDER
Commissioner of Ohio,)	
)	UPON RECONSIDERATION
Appellee.)	

APPEARANCES:

For the Appellants -	Glenn Altschuld, pro se 4202 Biddulph Avenue Cleveland, Ohio 44109
For the Appellee -	Jim Petro Attorney General of Ohio Richard Farrin Assistant Attorney General Taxation Section State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215-3248

Entered: Feb 14, 2003

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

This matter is before the Board of Tax Appeals upon a motion filed by the Tax Commissioner requesting that the board reconsider its decision and order issued in the above-captioned matter on January 17, 2003. Based upon a further review of the existing facts contained in the record and the law, the board finds the commissioner's motion to the effect that the Altschulds had properly established jurisdiction before him is well-taken. We hereby vacate our January 17, 2003 decision and order, and issue the following decision and order determining the merits of the appeal.

The Altschuld's appealed two final determinations of the Tax Commissioner, in which the commissioner affirmed two personal income tax assessments previously issued for the 1996 and 1997 tax years.

The Altschuld's 1991 personal income tax return was reviewed, and an income tax audit change form was issued, indicating tax due of \$2,394.91, plus interest of \$744.45. (S.T. 30) Mr. Altschuld paid the tax, although contesting it, but did not pay the interest because he felt it was based on the department's error. (S.T. 27)(Hearing tape) An assessment was then issued for 1991 in the amount of the interest due, \$744.45. The Altschulds were due a refund of \$368.28 from their 1995 return, which they requested be applied to their 1996 liability. Instead, this was applied to the 1991 assessment by the department. Because the 1995 overpayment was applied to the 1991 assessment rather than to the 1996 liability, there was a shortage for 1996. An assessment was issued for 1996 including the \$368.28 of tax, plus interest and penalty.

The Altschuld's 1996 return as filed indicated a refund of \$461.58, which they requested be applied to their 1997 liability. \$376.17 was applied to the 1991 assessment by the department. Because a portion of the 1996 overpayment was applied to the 1991 assessment rather than to the 1997 liability, there was a shortage for 1997. An assessment was issued for \$461.58 of tax, plus interest.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested.

Belgrade Gardens v. Kosydar (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp.*, supra.

The appellant had the burden to show in what manner and to what extent the Tax Commissioner's determination was in error. Mr. Altschuld acknowledges the payment was not a lump sum disbursement, and he was not entitled to the credit in 1991. However, he claims it was the department's error in giving him improper information. (Hearing tape) Estoppel does not apply against the state even where the Tax Commissioner's employees made misleading or confusing statements. *Loveland Park Baptist Church v. Kinney* (May 25, 1983), Warren App. No. 126, unreported.

Where no competent, probative evidence is presented to show that the Tax Commissioner's findings are incorrect, this board must affirm those findings. *Kern*, supra. Here, a credit was improperly taken on the 1991 return. Upon discovery by audit, the tax was adjusted, and interest was calculated. The appellants' have demonstrated no error in the commissioner's findings.

Based upon the foregoing, the Board of Tax Appeals finds that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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