

OHIO BOARD OF TAX APPEALS

Jonathan Barko,)
) CASE NO. 2007-M-1235
)
 Appellant,) (PERSONAL INCOME TAX
) PENALTY ABATEMENT)
)
 vs.)
)
) DECISION AND ORDER
 Richard A. Levin,)
 Tax Commissioner of Ohio,)
)
)
 Appellee.)

APPEARANCES:

For the Appellant - Jonathan Barko, pro se
4622 Industry Road
Ravenna, Ohio 44266

For the Appellee - Richard Cordray
Ohio Attorney General
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Entered June 9, 2009

Ms. Margulies, Mr. Johrendt, and Mr. Dunlap concur.

This cause and matter comes to be considered upon a notice of appeal filed by the appellant with the Board of Tax Appeals on October 25, 2007. The notice of appeal is from a final determination of the Tax Commissioner dated September 11, 2007, wherein that official modified a penalty assessment for tax years 2002 and 2003.

The matter is considered upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, and the testimony and other evidence presented at the hearing before this board. At that hearing, only the representative of the Tax Commissioner appeared. Mr. Barko did not attend, and therefore we have only the evidence certified by the Tax Commissioner through the statutory transcript to consider.

From the record transmitted to this board by the Tax Commissioner, we glean the following facts. Mr. Barko was assessed additional income tax for tax years 2002 and 2003 because information obtained by the state through an income-matching program with the federal government revealed a discrepancy between Mr. Barko's reported adjusted gross income on his federal income tax return and his state income tax return. S.T. 8-12. When such a discrepancy is found, a taxpayer is provided a certain time period to pay the taxes and interest due the state before additional penalties are imposed. S.T. 11.

Mr. Barko attempted to pay during that period of time prior to the imposition of penalty by mailing a check on May 1, 2006. That check apparently was not cashed. S.T. at 5. Because the check was not cashed, he stopped payment on August 10, 2006 and mailed a new check to the Ohio Department of Taxation on September 1, 2006.¹

¹ Ordinarily attachments to a notice of appeal are not the type of evidence upon which this board can rely in making a determination. *Fairchild Corp. v. Tracy* (Dec. 20, 1996), BTA No. 1995-T-137, unreported. However, the Tax Commissioner identifies this remittance in his final determination. S.T. 1.

The Tax Commissioner concluded that Mr. Barko's penalty abatement request should be granted in part. The Tax Commissioner reduced the late filing penalty to \$50.00 per year. It is that \$100.00 assessment that Mr. Barko challenges to this board. Mr. Barko claims through his notice of appeal that the Tax Commissioner's reduction from \$300 to \$100, in effect, supports his claim that he "did nothing wrong to warrant a penalty." Appellant's notice of appeal. Mr. Barko also is critical of the length of time the Tax Commissioner's final determination took to be issued.

The original assessment was imposed pursuant to R.C. 5747.10. The statute requires a taxpayer to report any corrections made to a federal tax return that affect state income tax. In the present appeal, Mr. Barko's federal and state income tax reports were not the same. Thus, the Tax Commissioner was correct in assessing the difference in the amount of tax due.

Penalties are assessed under R.C. 5747.15, which provides:

"(A) In addition to any other penalty imposed by this chapter or Chapter 5703. of the Revised Code, the following penalties shall apply:

"(1) If a taxpayer, *** required to file any report or return, including an informational notice, report, or return, under this chapter fails to make and file the report or return within the time prescribed, including any extensions of time granted by the tax commissioner, a penalty may be imposed not exceeding the greater of fifty dollars per month or fraction of a month, not to exceed five hundred dollars, or five per cent per month or fraction of a month, not to exceed fifty per cent, of the sum of the taxes required to be shown on the report or return, for each

month or fraction of a month elapsing between the due date, including extensions of the due date, and the date on which filed.”

The Tax Commissioner’s authority to abate the penalties imposed by R.C. 5747.15 is found in R.C. 5747.15(C), which provides in pertinent part:

“All or part of any penalty imposed under this section may be abated by the commissioner. All or part of any penalty imposed under this section may be abated by the commissioner if the taxpayer *** shows that the failure to comply with the provisions of this chapter is due to reasonable cause and not willful neglect.”

The Tax Commissioner has the discretion to apply penalties in cases in which a taxpayer’s federal and state returns do not agree. His records showed that Mr. Barko’s state income tax returns reported amounts different from his federal returns. S.T. 7, 8. Therefore, the Tax Commissioner properly assessed. Once penalties are applied, the Tax Commissioner has the discretion to abate such penalties if the taxpayer “shows that the failure to comply with the provisions of [state income tax reporting and remitting requirements] is due to reasonable cause and not willful neglect.” This board has recently stated in *Krall v. Levin* (Sept. 16, 2008), BTA No. 2007-T-892, unreported:

“R.C. 5747.15(C) provides that the commissioner ‘may’ remit all or part of the mandatorily imposed penalties. The commissioner’s authority is therefore discretionary. As a result, once the commissioner denies abatement, we may not reverse his determination unless an abuse of discretion is specifically demonstrated. *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67; *Kemppel v. Zaino* (2001), 91 Ohio St.3d 120. An abuse of discretion connotes more than an error of law or judgment; it implies

that the decision was unreasonable, arbitrary, or unconscionable. *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728. See, also, *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83. As a reviewing body, we may not substitute our judgment for that of the commissioner; moreover, the burden is with the appellant to demonstrate the abuse. *State ex rel. Duncan*, supra; *Smith v. Ohio Dept. of Human Serv.* (1996), 115 Ohio App.3d 755.” Id. at 2. (Emphasis sic.)

While we acknowledge Mr. Barko’s claim that a partial grant of abatement indicates that the Tax Commissioner concluded that Mr. Barko’s attempt to pay within the time period allotted by the Tax Commissioner before penalties were to be imposed was a valid reason for remission of the penalties, we cannot find that the failure to abate penalties in total was unreasonable, arbitrary, or unconscionable. Therefore, and considering the foregoing, the Board of Tax Appeals finds that the final determination of the Tax Commissioner must be affirmed.

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