

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, Mrs. Robin Senser appeared and provided testimony regarding the late filing of her and her husband's 2004 income tax return. The Tax Commissioner's representative appeared and argued for the affirmance of the Tax Commissioner's determination.

Mrs. Senser testified that she prepared both her 2004 federal and state income tax returns using a computer program which allows the preparer to transmit the finished return online. She testified that she was unable to pay the tax due at the time the return was due, so at a later time she sent her remittance to the state.¹ She believed that the returns had been properly filed until mid-2006, when she was informed by both the state of Ohio and the federal government that her 2004 returns had not been received. At that time she contacted the state department of taxation, where she was told to submit her information online, but to do so using programming provided by the state of Ohio. She prepared the return using the same information entered into the commercial program, but the state's calculations resulted in additional tax due. Mrs. Senser received a "notice of corrected assessment" on November 8, 2006, indicating that tax, pre-assessment

¹ The Tax Commissioner's final determination indicates that the taxes were remitted on July 5, 2006. However, the Tax Commissioner's computer screen printouts indicate that \$2,202.00 was remitted July 11, 2005. Compare S.T. at 1 with S.T. at 12. The 2004 income tax return was filed, according to the Tax Commissioner, on October 5, 2006. S.T. at 10.

interest and penalty were due. Mrs. Senser paid the tax and interest due and requested abatement of penalty.

The Tax Commissioner denied abatement, giving two reasons for his denial. The Tax Commissioner first noted that the Ohio Department of Taxation did not receive the 2004 income tax return within the time limitations required by law. The Tax Commissioner next highlighted the fact that Mrs. Senser and her husband had “not timely remitted income tax prior to and subsequent to the assessment at hand.” S.T. at 1. The appeal to this board ensued.

The original assessment was imposed pursuant to R.C. 5747.13. The statute provides authority to the Tax Commissioner to assess a taxpayer when a tax return has not been filed. In the present appeal, the Tax Commissioner did not receive a tax return from the Sensers, and therefore, an assessment issued.

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 his records show that a taxpayer’s return has not been filed in accordance with statutory timelines. It is clear from the facts of this matter that the Sensers tax return was not timely received by the state. Mrs. Senser has no proof that the state received her 2004 return on time and, further, acknowledged that the federal government also informed her that it had not received her federal filing. 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.)

Mrs. Senser argues that the commissioner’s decision to deny abatement indicates that her claim that she attempted to file but, for reasons unknown to her, the transmissions did not complete, was not believed. She further argues that her past record of delinquencies in tax obligations should not be considered in the present, because appellants have worked diligently to bring all past delinquencies current. We do not consider the Tax Commissioner’s denial of abatement to be a signal that Mrs. Senser’s claims were not believed. However, we also do not consider the Tax Commissioner’s denial to be unreasonable, arbitrary, or abusive. While we commend Mrs. Senser for bringing back delinquencies current, we can understand the Tax Commissioner’s reluctance to abate a penalty for a taxpayer who admits that, even with regard to the tax period covered by the return which she claims was timely filed, income taxes due the state were not remitted until after the time provided by law.

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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