

OHIO BOARD OF TAX APPEALS

Romie Conn, Jr.,)
)
 Appellant,) (CASE NO. 2007-M-421
) (PERSONAL INCOME TAX)
)
 vs.) DECISION AND ORDER
)
 Richard A. Levin,)
 Tax Commissioner of Ohio,)
)
 Appellee.)

APPEARANCES:

For the Appellant - Romie Conn, Jr., pro se
438 South 30th Street
Heath, Ohio 43056

For the Appellee - Richard Cordray
Ohio Attorney General
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Entered May 12, 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 June 25, 2007. The notice of appeal is from a final determination of the Tax Commissioner dated May 2, 2007, wherein that official affirmed a penalty assessment against appellant for failure to file an income tax return for tax year 1995.

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, Mr. Romie Conn, Jr. appeared and provided testimony regarding his claim that the assessment affirmed by the Tax Commissioner was in error.

Mr. Conn testified that he is currently retired. Prior to retirement, he worked for the Defense Supply Center Columbus (“DSCC”), a federal installation located in the state of Ohio. Mr. Conn testified that it was his practice to file tax returns yearly, as he was required to have a certain level of security clearance at DSCC, and without filing and paying income tax, his security would have been in jeopardy. Digital Recording Hearing Record (“H.R.”)

Despite his practice, Mr. Conn received a letter from the Ohio Department of Taxation in 2004 which stated that information received from the Internal Revenue Service (“IRS”) indicated that Mr. Conn had received income within the state. A review of the state’s records, however, revealed no record of the filing of state income tax returns for both 1994 and 1995. The letter requested copies of filed Ohio income tax returns. S.T. at 12.

Mr. Conn testified that he suffered a fire in 2000 in which his personal documents were destroyed. Because he had no records from the 1994/1995 periods, Mr. Conn reached out to agencies he believed would have documents supporting his claim that he had filed tax returns for those years. He

contacted both his former employer and the IRS in an attempt to obtain records. He was told by both his former employer and the IRS that records were kept for only a limited period of time, and, by 2004, his 1994 records had been destroyed. H.R.

On March 24, 2006 an assessment issued. S.T., at 16. The original assessment was for \$1,591.00, which included tax due of \$1,152.00, interest of \$289.00, and a penalty of \$150.00. On April 8, 2006 Mr. Conn challenged the assessment. Id. at 2. However, as of April 17, 2006, the date indicated by Ohio Department of Taxation's assessment detail, the department had reduced the amount of the original assessment to \$150.00. Id. at 16.¹ By final determination, the Tax Commissioner removed tax and interest due, but affirmed the penalty assessment. S.T. at 1.

At hearing, counsel for the Tax Commissioner explained why the assessment was modified. She stated that based upon the information obtained from the federal government, the Tax Commissioner believed that income tax had originally been withheld. H.R. Despite there being no indication of payment on the proposed assessment, nor discussion of the reason for reduction within the statutory transcript, the fact remains that the final determination reflects only a penalty assessment.

¹ The board presumes that R.C. 5747.13(E)(1) is satisfied because the commissioner reduced the assessment by the amount of tax and interest due.

We would also note that, originally, Mr. Conn received letters stating that the tax department had not received either 1994 or 1995 tax returns. The final determination before this board, however, references only the 1995 tax year. Mr. Conn's documentation indicates that the state of Ohio had withheld a 2004 tax refund to pay a tax assessment. At hearing, upon questioning, Mr. Conn stated that the offset was paid against the assessment outstanding for tax year 1994. The refund was actually more than the tax assessment due, and Mr. Conn acknowledged that he received a partial refund from the state.

The only issue that remains before us is the propriety of the penalty assessment for 1995. The assessment was imposed pursuant to R.C. 5747.13. That section provides:

“(A) *** If any taxpayer fails to file a return or fails to pay the tax imposed by section 5747.02 *** of the Revised Code, the taxpayer is personally liable for the amount of the tax.

“If any *** taxpayer *** required to file a return under this chapter fails to file the return within the time prescribed, *** fails to remit the full amount of the taxes due for the period covered by the return, *** the tax commissioner may make an assessment against any person liable for any deficiency for the period for which the return is or taxes are due, based upon any information in the commissioner's possession.

“An assessment issued against either the employer or the taxpayer pursuant to this section shall not be considered an election of remedies or a bar to an assessment against the other for failure to report or pay the same tax. No assessment shall be issued against any person if the tax actually has been paid by another.”

Penalties are imposed by R.C. 5747.15, which provides in pertinent part:

“(A) In addition to any other penalty imposed by this chapter ***, 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, *** 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.”

According to the Tax Commissioner’s representative, the penalty imposed upon Mr. Conn was for failure to file a return. We understand Mr. Conn’s logic that it would have been unlikely for him not to file his returns, given his need to protect his security clearance. It also does not appear from the record that Mr. Conn failed to file any other income tax return, except for those due in 1994 and 1995, as the Tax Commissioner’s records would have revealed such delinquencies. Further, Mr. Conn did not express any disinclination to file returns. However, the Ohio Department of Taxation failed to receive a tax return from Mr. Conn. Although Mr. Conn claims he regularly filed returns, he has no proof that the return for 1995 was filed.

The Tax Commissioner has the discretion to apply penalties in cases in which returns are not filed. His records show no return was filed for 1995.

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. [sic] 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.)

We acknowledge that the record is unclear as to why the taxes and interest were removed, but the penalty remains. Nevertheless, we cannot find that the failure to abate penalties 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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