

## OHIO BOARD OF TAX APPEALS

Paul A. & Carole A. Mancino,	)	CASE NO. 2007-Z-205
	)	
Appellants,	)	(PERSONAL INCOME TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Richard A. Levin, Tax	)	
Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellants	- Paul A. & Carole A. Mancino, pro se 2072 South Green Road South Euclid, Ohio 44121
For the Appellee	- Richard Cordray Attorney General of Ohio Ryan P. O'Rourke Assistant Attorney General Taxation Section State Office Tower, 25th Floor 30 East Broad Street Columbus, Ohio 43215-3428

Entered January 27, 2009

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

The Tax Commissioner has filed with this board a motion, in which he asks us to affirm his final determination. In that final determination, issued on February 13, 2007, the commissioner determined that he lacked subject-matter jurisdiction over Mr. & Mrs. Mancino's petition for reassessment because they failed to pay the assessment, as required by R.C. 5747.13. The appellants did not file a response to the commissioner's motion to affirm. We, therefore, consider this matter pursuant to the commissioner's motion and the existing record.

Every taxpayer who is liable for income earned or received in this state is required to file an annual income tax return. R.C. 5747.08. Returns must be filed, annually, by the fifteenth day of April. R.C. 5747.08(G). If, however, a taxpayer's annual income tax liability "must be altered as the result of an adjustment to the taxpayer's federal income tax return, whether initiated by the taxpayer or the internal revenue service, and such alteration affects the taxpayer's tax liability \*\*\*, the taxpayer shall file an amended return with the tax commissioner in such form as the commissioner requires." R.C. 5747.10.

The record before us establishes that the Ohio Department of Taxation ("ODT") obtained information from the Internal Revenue Service ("IRS") that the appellants' 1996 and 1997 federal adjusted gross income had been increased as a result of a review performed by the IRS. Although the adjustments altered the appellants' Ohio income tax liability, the appellants failed to file an amended return with ODT, as required by R.C. 5747.10. On February 24, 2005, ODT informed the appellants of the deficiencies and the amounts due. S.T. at 8. ODT subsequently issued an assessment for the delinquencies on July 20, 2005. S.T. at 11. The assessment was in the amount of \$14,950.05, including penalty and interest. S.T. at 11.

The appellants filed a timely petition for reassessment but did not pay the assessment. S.T. at 3. Subsequently, the Tax Commissioner dismissed the petition because of the failure to pay the assessment at the time the petition was filed. S.T. at 1. The commissioner now asserts that we must affirm the dismissal. We agree.

Pursuant to R.C. 5747.13, a taxpayer's ability to challenge an income tax assessment is specifically dependent upon the payment of the assessment. Under R.C.

5747.13(B), a taxpayer must file a petition for reassessment within sixty days after service of the notice of assessment. R.C. 5747.13(E) further provides:

“The portion of an assessment that must be paid upon the filing of a petition for reassessment shall be as follows:  
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“(2) *If the taxpayer or qualifying entity that is assessed failed to file, prior to the date of issuance of the assessment, the annual return or report required by section 5747.08 or 5747.42 of the Revised Code, any amended return or amended report required by section 5747.10 or 5747.45 of the Revised Code for the taxable year at issue, or any report required by division (B) of section 5747.05 of the Revised Code to indicate a reduction in the amount of the credit provided under that division, payment of the assessment, including interest but not penalty, is required, except as otherwise provided under division (E)(6) or (7) of this section \*\*\*.*” (Emphasis added.)

Based upon the foregoing, payment of the assessment, i.e., the tax and interest but not the penalty, became a condition precedent to the appellants’ ability to have the assessment reviewed by the Tax Commissioner. The right to contest an assessment specifically depends upon payment of the assessment upon the filing of a petition for reassessment. See *W.T. Grant Co. v. Lindley* (1977), 50 Ohio St.2d 7, 8; *Niemeyer v. Collins* (1976), 45 Ohio St.2d 63, 64-65; and, *Pre-Fab Transit Co. v. Bowers* (1964), 176 Ohio St. 163. In the instant matter, the amount of tax and interest necessary to be paid to invoke the commissioner’s jurisdiction over the petition was \$14,650.05. S.T. at 11. The record shows that the appellants made no payments; consequently, the commissioner was without jurisdiction to consider the appellants’ petition for reassessment.

While the appellants did not file a response to the Tax Commissioner's motion, it appears from the record that the appellants contend that R.C. 5747.13(E)(2) did not apply to them because they timely filed the "functional equivalent" of an amended return as required by R.C. 5747.10. Upon review of the existing record before us, we are unable to conclude that the appellants filed an amended return or the "functional equivalent" of an amended return. We note that in a letter to ODT dated March 22, 2005, Mr. Mancino made reference to "information" that was provided to ODT on September 27, 1999. S.T. at 14. Thereafter, in a letter dated August 10, 2006, ODT indicated that such information could not be located and requested a copy of such information. S.T. at 15. It appears that such information was forwarded to ODT along with a letter dated August 28, 2006 by Mr. Mancino. S.T. at 23-24. The information to which Mr. Mancino was referring in his March 22, 2005 letter was apparently a copy of the adjustments made to the appellants' federal income tax return by the IRS for tax years 1996 and 1997. S.T. at 24.

Mr. Mancino's argument appears to be that by providing ODT with a copy of the adjustments made to the appellants' federal income tax return by the IRS for tax years 1996 and 1997, the appellants filed the "functional equivalent" of an Ohio income tax amended return, thereby satisfying the requirements of R.C. 5747.10. For purposes of R.C. 5747.13(E)(2), the appellants appear to be arguing that such provision does not apply to them since they allegedly filed the "functional equivalent" of an amended return on September 27, 1999, prior to the date of the issuance of the assessment, July 20, 2005. We disagree. The existing record lacks sufficient competent and probative evidence to support the appellants' contention that they filed

an amended return or the functional equivalent thereof prior to the issuance of the assessment.

In *Wagenknecht v. Levin*, Slip Opinion No. 2008-Ohio 6812, a case with striking similarities to the instant matter, the Ohio Supreme Court considered whether an affidavit allegedly filed by the taxpayer satisfied the requirement to file an amended return pursuant to R.C. 5747.10. The Ohio Supreme Court held as follows:

“R.C. 5747.10 specifically requires that an amended return be submitted ‘in such form as the commissioner requires.’ The affidavit plainly does not equate to the Form IT-1040X, the standard amended return published by the Ohio Department of Taxation, or to any other form prescribed by the commissioner. Accordingly, *Wagenknecht* did not file an amended return pursuant to R.C. 5747.10.” *Id.* at ¶9.

Likewise, the appellants’ “functional equivalent” of an amended return does not equate to the Form IT-1040X, the standard amended return published by the Ohio Department of Taxation, or to any other form prescribed by the commissioner. Accordingly, we conclude that the appellants failed to file an amended return pursuant to R.C. 5747.10.

Another argument submitted by the appellants is that payment was not required pursuant to R.C. 5747.13(E)(2) because the assessment was barred by the statute of limitations contained in R.C. 5747.13(A). However, although the four-year statute of limitations imposed upon the state under R.C. 5747.13(A) limits the ability of the state to issue an assessment upon a return, the statute does not bar an assessment against a taxpayer who fails to file an amended return pursuant to R.C. 5747.10. See *Gibson v. Levin* (2008), 119 Ohio St.3d 517, at syllabus (“Four-year statute of limitation for issuing an assessment does not commence if a taxpayer fails to file a

required return.”). See, also, *Gibson v. Limbach* (1991), 74 Ohio App.3d 498, motion to certify overruled (1991), 62 Ohio St. 3d 1445 (holding that because “appellants failed to file a return that was subject to an assessment (*i.e.*, an amended return), the statute of limitations on the state assessment, which was the result of the federal adjustments, has not commenced to run”); *Waring v. Wilkins* (Aug. 19, 2005), BTA No. 2004-V-626, unreported. Cf. *McLean Trucking Co. v. Lindley* (1982), 70 Ohio St. 2d 106. In the instant matter, we have heretofore concluded that the appellants failed to file the amended return required under R.C. 5747.10. Therefore, the statute of limitations imposed by R.C. 5747.13(A) did not commence.

Based upon the foregoing, the Board of Tax Appeals finds that the appellants failed to invoke the commissioner’s subject-matter jurisdiction due to a failure to comply with the provisions of R.C. 5747.13. We therefore conclude that the final determination is supported by a preponderance of the evidence and is in accordance with law. Accordingly, the Board of Tax Appeals hereby affirms the Tax Commissioner’s final determination.

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