

**OHIO BOARD OF TAX APPEALS**

Robert D. Metzger and Kristy M. Metzger,	)	CASE NO. 2008-N-2409
	)	
Appellants,	)	(PERSONAL INCOME TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Richard A. Levin, Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellants -	Robert D. Metzger and Kristy M. Metzger , pro se	1725 Rockhurst Lane Cincinnati, Ohio 45255
For the Appellee -	Richard Cordray	Attorney General of Ohio Lawrence D. Pratt Assistant Attorney General 30 East Broad Street, 25 <sup>th</sup> Floor Columbus, Ohio 43215

Entered January 27, 2009

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

On December 30, 2008, an order was issued requiring the appellants, Robert D. Metzger and Kristy M. Metzger, to show cause as to why this appeal should not be dismissed. The appellants have not filed a response to the order. The notice of appeal filed by appellants is from a final determination of the Tax Commissioner. In said determination, the commissioner dismissed appellants’ petition for reassessment based on a lack of jurisdiction.<sup>1</sup>

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<sup>1</sup> Appellants’ appeal may have an additional jurisdictional defect other than that addressed in this decision. R.C. 5717.02 specifically requires that a notice of appeal be filed with the commissioner as well as this board. On January 15, 2009, this board received a certified statement from the commissioner noting that, as of January 8, 2009, no copy of appellants’ notice of appeal had been filed with the commissioner.

The commissioner's final determination, dated October 22, 2008, found that he was without jurisdiction because the appellants, Robert D. Metzger and Kristy M. Metzger, failed to pay the balance of an assessment due upon the filing of their petition, as required by Ohio law. The commissioner's final determination stated \$6.32 has been paid, which, according to the commissioner, left a balance due on the assessment of \$909.33, plus post-assessment interest.

In determining that the commissioner did not have jurisdiction in this matter, the commissioner's final determination cited R.C. 5747.13(E)(4), which provides as follows:

“The portion of an assessment that must be paid upon the filing of a petition for reassessment shall be as follows:

“\*\*\*

“(4) If the taxpayer or qualifying entity that is assessed filed, prior to the date of issuance of the assessment, the annual return or the report required by section 5747.08 or 5747.42 of the Revised Code, all amended returns or reports required by section 5747.10 or 5747.45 of the Revised Code for the taxable year at issue, and all reports 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, and a balance of the taxes shown due on the returns or reports as computed on the returns or reports remains unpaid, payment of only that portion of the assessment representing the unpaid balance of tax and interest is required[.]”

Appellants do not claim in their notice of appeal that payment of tax and interest was made with the petition for reassessment. Appellants requested “proof from the State of Ohio that I received credit for the payments I sent to you in 2006.” However, the final determination states, in part:

“The petitioners do not deny that the balance due on the return was not paid with the return, and the petitioners assert that they paid the amount due during 2006. However, the payments during 2006 were estimated payments for the 2006 tax year.”

In the area of income taxation, a taxpayer’s right to contest an assessment is specifically made dependent on full payment of the assessment. R.C. 5747.13(E). Accordingly, full payment of an assessment becomes a condition precedent to the right of a taxpayer to have an income tax assessment reviewed by the Tax Commissioner. Further, the requirement of prepayment prior to review of a tax assessment has been deemed constitutionally valid by the Supreme Court. See *Pre-Fab Transit Co. v. Bowers* (1964), 176 Ohio St. 163; *Niemeyer v. Collins* (1976), 45 Ohio St.2d 63; *W.T. Grant Co. v. Lindley* (1977), 50 Ohio St.2d 7. Thus, appellants were required to make payment of the full assessment due upon the filing of the petition for reassessment. See *Wagenknecht v. Levin*, Slip Opinion No. 2008-Ohio 6812; *Pengov v. Ohio Dept. of Taxation*, Franklin App. No. 06AP-60, 2006-Ohio-3711, discretionary appeal not allowed, 2006-Ohio-6447; *Herr v. Tracy* (Sept. 20, 1996), BTA No. 1995-J-1345, unreported, affirmed (Apr. 28, 1997), Butler App. No. CA96-10-212, unreported. See, also, *Sima v. Wilkins* (Nov. 30, 2007), BTA Nos. 2006-Z-2211, 2219, unreported; *Lage v. Zaino* (July 12, 2002), BTA No. 2001-T-846, unreported; *Mesina v. Tracy* (Aug. 5, 1994), BTA No. 1993-K-983, unreported; *Parkinson v. Tracy* (Mar. 18, 1994), BTA No. 1992-H-460, unreported.

Additionally, in *Wagenknecht*, supra, the Supreme Court, in addressing whether this board may affirm the commissioner’s dismissal of a taxpayer’s petition for reassessment without holding a hearing, held that this board properly issued a

summary affirmance in that matter. Referencing its decision in *Brown v. Levin*, 119 Ohio St.3d 335, 2008-Ohio-4801, the court stated “[a]s we have held, a litigant’s right to a hearing under R.C. 5717.02 does not encompass a right to present evidence on points that are not jurisdictionally before the BTA.” *Wagenknecht*, supra, at ¶21.

Here, the record before us plainly indicates that appellants did not include payment with their petition for reassessment. We see nothing in the record that proves otherwise, as appellants did not avail themselves of the opportunity to respond to this board’s show cause order. Without payment as required by R.C. 5747.13(E), the Tax Commissioner is without legal authority to consider appellants’ claims. The assessment has not yet been paid, and the Tax Commissioner was correct when he determined that he was without authority to consider the petition for reassessment.

Accordingly, we hereby affirm the Tax Commissioner’s dismissal of the petition for reassessment.

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