

## OHIO BOARD OF TAX APPEALS

Acom Solutions, Inc.,	)	
	)	
Appellant,	)	CASE NO. 2009-A-245
	)	
vs.	)	(INCOME WITHHOLDING TAX)
	)	
Richard A. Levin, Tax Commissioner of Ohio,	)	DECISION AND ORDER
	)	
Appellee.	)	

APPEARANCES:

For the Appellant - Frank A. Loera, CPP  
Payroll Solutions  
17011 Beach Boulevard, Suite 700  
Huntington Beach, CA 92647

For the Appellee - Richard Cordray  
Attorney General of Ohio  
Lawrence Pratt  
Assistant Attorney General  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215

Entered May 5, 2009

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

This appeal is now considered by the Board of Tax Appeals following the issuance of an order requiring that “appellant show cause why this board should not affirm the Tax Commissioner’s dismissal of appellant’s petition for reassessment.” The order was issued, sua sponte, upon receipt of the subject notice of appeal which was taken from a final determination of the commissioner, dated December 12, 2008, wherein the commissioner concluded that he was without jurisdiction to consider appellant’s petition for reassessment since payment of the assessed tax and interest was not made, as required by R.C. 5747.13(E).

Specifically, the notice of appeal in question was filed with this board on February 11, 2009, contesting the penalty assigned in association with an assessment against the taxpayer for the late payment of employer withholding tax for the period of October 1, 2006 through December 31, 2006. The commissioner, in his final determination, determined that he had no jurisdiction to consider the taxpayer's petition for reassessment because the assessed tax and/or interest had not been paid in full prior to the filing of the petition, pursuant to the requirements of R.C. 5747.13(E). Such section provides in pertinent part, as follows:

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

“\*\*\*

“(5) If the employer assessed filed, prior to the date of issuance of the assessment, the annual return required by division (E)(2) of section 5747.07 of the Revised Code covering the period at issue, and a balance of the taxes shown due on the return as computed on the return remains unpaid, payment of only that portion of the assessment representing the unpaid balance of tax and interest is required;”

The appellant responded to the board's show cause order, but indicated that it had no additional information to provide beyond what it had already submitted as part of its notice of appeal. Specifically, appellant contends that it made the withholding tax payment in question in a timely fashion, but that it apparently never reached or was recorded by the Tax Commissioner. S.T. at 3. As a result, a replacement payment was forwarded to the commissioner, and apparently received on September 12, 2007, as noted in the commissioner's final determination. S.T. at 2, 24.

Based upon the foregoing, the commissioner determined he was without jurisdiction to consider appellant's petition for reassessment, dated July 31, 2007.

Thus, based upon the record before the board, including the statutory transcript certified to this board by the Tax Commissioner and the appellant's notice of appeal, we find that the taxpayer did not pay the tax and associated interest in question prior to filing its petition for reassessment, dated July 31, 2007. 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, herein, appellant was required to make full payment of the tax and interest due upon the filing of its petition for reassessment, which it did not do. See *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, *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.

Therefore, based upon the foregoing, it is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed.

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