

OHIO BOARD OF TAX APPEALS

Lowry Plumbing of Canton, Inc.,)	CASE NO. 2009-A-450
)	
Appellant,)	(INCOME WITHHOLDING TAX)
)	
vs.)	DECISION AND ORDER
)	
Richard A. Levin, Tax Commissioner)	
of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant - Thomas P. Lowry, President
Lowry Plumbing of Canton, Inc.
707 Navarre Road SW
Canton, Ohio 44707-4056

For the Appellee - Richard Cordray
Attorney General of Ohio
Lawrence Pratt
Assistant Attorney General
30 East Broad Street, 25th 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 February 20, 2009, 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). No response to the board's order was filed by appellant.

Specifically, the notice of appeal in question was filed with this board on March 24, 2009, contesting the penalty and interest assigned in association with an assessment against the taxpayer for failure to pay employer withholding tax for the period reported as "December 31, 2006." S.T. at 23. The commissioner, in his final determination, concluded 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;"

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 interest in question upon filing its petition for reassessment, received on or about August 7, 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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