

**OHIO BOARD OF TAX APPEALS**

Academy Electronics Repair, Inc., )  
 )  
 Appellant, ) (EMPLOYER WITHHOLDING TAX)  
 )  
 vs. )  
 ) DECISION AND ORDER  
 )  
 Richard A. Levin, )  
 Tax Commissioner of Ohio, )  
 )  
 Appellee. )

**APPEARANCES:**

For the Appellant-	Academy Electronics Repair Inc. William Gamber, President Constance J. Osmeyer, Secretary/Treasurer 7500 E. Main Street Reynoldsburg, Ohio 43068
For the Appellee- Tax Commissioner	Richard Cordray Attorney General of Ohio Lawrence Pratt Assistant Attorney General 30 E. Broad Street, 25 <sup>th</sup> Floor Columbus, Ohio 43215

Entered May 19, 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 April 9, 2009. The notice of appeal is from a final order of the Tax Commissioner dated January 12, 2009,<sup>1</sup>

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<sup>1</sup> There appears to be another potential jurisdictional defect with the matter. An appellant is given 60 days from the date of receipt of the final determination in which to appeal to the Board of Tax Appeals. R.C. 5717.02. It appears that the final determination was mailed on January 12, 2009, but the notice of appeal was not filed until April 9, 2009, more than 60 days after the mailing of the final determination. However, as the Tax Commissioner did not present a statutory transcript to this board, we are unable to determine when the final determination was mailed to the appellant. Therefore, we will consider whether the Tax Commissioner was correct in dismissing the matter before him.

wherein that official affirmed an employer withholding tax assessment. Appellant sought abatement of the penalty. However, the Tax Commissioner concluded that the appellant failed to submit the required payment with the petition for reassessment. Therefore, the Tax Commissioner found he was without jurisdiction to consider the abatement request.

The matter is considered upon the notice of appeal and attachments thereto. The board issued a motion seeking input from the parties regarding the Tax Commissioner's determination that he had no jurisdiction to consider the matter. Neither party responded. Additionally, the board has not received a statutory transcript in this matter. However, the board finds that the notice of appeal and attachments thereto provide sufficient factual information which, if considered most favorably to the appellant, still fails to vest jurisdiction in the Tax Commissioner.

It appears from the record that the Tax Commissioner originally found that appellant failed to file and/or remit withholding taxes withheld during the years 1998 through 2002, and assessed tax, interest, and penalty, as required by R.C. 5747.13(A). Assessment attached to notice of appeal. Appellant sought remission of the penalty assessed, but failed to pay that portion of the assessment required by R.C. 5747.13(E)(5) before the Tax Commissioner may consider abatement. Documents attached to the notice of appeal indicated that on April 9, 2009, prior to the filing of the notice of appeal with this board, appellant remitted the tax due the state, but not interest and penalty.

The appellant now seeks release from the penalty. However, this board must find that the Tax Commissioner was correct when he concluded that he had no jurisdiction to consider appellant's petition for reassessment. If a taxpayer fails to file a return or remit the tax due, the Tax Commissioner may issue an assessment for tax, interest, and penalty. R.C. 5747.13. To contest the assessment, the taxpayer must file a petition for reassessment within the time provided by law, and must pay a portion of the outstanding assessment. R.C. 5747.13(E)(5) requires that a portion of the assessment be paid at the time of the filing of the petition for reassessment. Specifically, the statute provides:

“(E) 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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“(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.”

While appellant provided indication that the tax due was paid in April 2009, it has not challenged the Tax Commissioner's finding that tax and interest were not paid when the petition for reassessment was filed in November 2007. R.C. 5747.13(F) makes provision for a refund to the taxpayer, with interest, on that amount of the assessment found not to be due and owing. However, there is no provision for the Tax Commissioner to consider a petition for reassessment of income withholding

tax when the requirements of R.C. 5747.13 have not been met. As recently as July 2006, the requirement that a portion of an assessment be paid prior to review has been found to be constitutional. *Pengov v. Ohio Dept. of Taxation*, Franklin App. No. 06AP-60, 2006-Ohio-3711.

Therefore, this board must conclude that the Tax Commissioner was correct when he dismissed appellant's petition for reassessment as payment of the tax and interest due was not made by the time the petition for reassessment was filed. Therefore, the Tax Commissioner's final determination is affirmed.

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