

James R. Greene, Jr. and )  
 Laura M. Greene (Deceased), )  
 ) Case No. 96-J-351  
 Appellant, )  
 ) (INCOME TAX)  
 vs. )  
 ) DECISION AND ORDER  
 Roger W. Tracy, )  
 Tax Commissioner of Ohio, )  
 )  
 Appellee. )

APPEARANCES:

For the Appellant - James R. Greene, Jr.  
Pro Se  
 P.O. Box 31548  
 Dayton, Ohio 45437

For the Appellee - Betty D. Montgomery  
 Attorney General of Ohio  
 By: Richard C. Farrin  
 Assistant  
 30 East Broad Street  
 Columbus, Ohio 43215

Entered January 24, 1997

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

The Board of Tax Appeals is considering this matter pursuant to a notice of appeal filed herein by James R. Greene, Jr. ("Appellant") Appellant has appealed from six final determinations of the Tax Commissioner which denied appellant's income tax refund claims for tax years 1977 through 1992. The final determinations are similar with the exception of the amount of refund being sought, the filing date of the Application for Personal Income Tax Refund, and the due date of the respective returns. <sup>1</sup> Therefore only

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<sup>1</sup>The refund being sought for the 1977 tax year is listed as '\$8.00/plus unknown'. The refund being sought for the 1978 tax year is listed as '\$0.00/plus unknown'. The refund being sought for the 1979 tax year is listed as '\$1,009.63/plus unknown'. The refund being sought for the 1980 tax year is listed as 'unknown'. The refund being sought for the 1981 tax year is listed as

the final determination for tax year 1977 is totally reproduced

herein as follows:

"This matter involves a claim under R.C. 5747.11 for refund of '\$8.00/plus unknown'.

"The applicants have filed an Application for Personal Income Tax Refund for the 1977 tax year, stating their contention as follows: 'IT-1040 filed, can't remember if received refund or made a payment if any tax was due. This application is to help Tax Commissioner and staff to better apply Sec 5703.47 R.C. (sic) and 5747 of the Revised Code. (Note: interest, penalty, or fees not included.)' This contention is not well taken.<sup>2</sup>

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'\$231.80/plus Unknown Assessment'. The refund being sought for the 1982 through 1992 tax years is listed as 'unknown/\$246.00'.

<sup>2</sup>The second paragraph of the Final Determination for the 1978 tax year reads: "The applicants have filed an Application for Personal Income Tax refund for the 1978 tax year, stating their contention as follows: 'filed only to have Tax Department check to see if any past refund was applied to this tax year and/or if any tax payment is due. (Note: not including interest, penalty, or fees).' This contention is not well taken."

The second paragraph of the Final Determination for the 1979 tax year reads: "The applicants have filed an Application for Personal Income Tax Refund for the 1979 tax year, stating their contention as follows: 'IT-1040 filed as required to help Tax Commissioner staff assess proper taxes and apply refund, payments, plus correct any erroneous, and unknown collections. (Note: Not including interest, penalty, or fees).' This contention is not well taken."

The second paragraph of the Final Determination for the 1980 tax year reads: "The applicants have filed an Application for Personal Income Tax Refund for the 1980 tax year, stating their contention as follows: 'IT-1040 required for 1980, plus unknown status of previous year(s) (1977, 1978, 1979) to include illegal or erroneous payment to Treasure (sic) of State of Ohio (Note: not incling (sic) interest, penalty, or fees).' This contention is not well taken".

The second paragraph of the Final Determination for the 1981 tax year reads: "The applicants have filed an Application for Personal Income Tax Refund for the 1981 tax year, stating their contention as follows: 'IT-1040 filed as per 1981 tax requirement, plus unknown status of previous four (4) years (1977, 1978, 1979, and 1980). (Note: not including interest, penalty, or fees).' This contention is not well taken".

"R.C. 5747.11, as in effect for the period at issue, provides the statute of limitations that applies to refund applications, in pertinent part:

'Applications for refund must be filed with the commissioner within four years from the date of the illegal, erroneous, or excessive payment of the tax.'

"In Lee v. Tracy (1995), 71 Ohio St. 3d 572, the Ohio Supreme Court interpreted R.C. 5747.11 as follows:

'R.C. 5747.11 empowers the commissioner to refund illegal, erroneous, or excessive payments of income tax if the taxpayer files an application for refund within four years from the date when a return is timely filed or should have been filed. Thus, Lee (the taxpayer) had until April 15, 1991, four years from the due date of his 1986 income tax return ... to apply for a refund. Since he failed to so apply, the commissioner correctly dismissed his refund application, and the BTA appropriately affirmed the commissioner's order.'

"In the instant case, the applicants' Application for Personal Income Tax Refund was dated June 14, 1994. <sup>3</sup> Information in the file

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The second paragraph of the Final Determination for the tax years 1982 through 1992 reads: "The applicants have filed an Application for Personal Income Tax Refund for the years at issue, stating their contention as follows: 'This claim is filed, in order too (sic) complete this Taxpayer(s) (sic) status and justify any or all actions completed by special staff of the State Tax Legal Department, collection department, and Ohio department of taxation income tax Division (sic), for the State Tax Commissioner of Ohio'. This contention is not well taken".

<sup>3</sup>The final determination for tax year 1977 lists the date of appellants' Application for Personal Income Tax Refund as June 14, 1994. Their 1977 Ohio income tax return was filed in March, 1978.

The final determination for tax year 1978 lists the date of appellants' Application for Personal Income Tax Refund as June 21, 1994. Their 1978 Ohio income tax return was due to be filed by April 15, 1979.

indicates that the applicants filed their 1977 Ohio income tax return in March 1978. Thus, the applicants filed their refund claim more than four years after they filed their return, and their application cannot be considered.

"Assuming, arguendo, that the applicants had met the four year statute of limitations of R.C. 5747.11, the applicants have not raised a contention as to the propriety of the amount of tax paid or stated a reason why they be granted a refund.

"Accordingly, this matter is dismissed."

The matter has been submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcripts certified herein by the Tax Commissioner, and the evidence adduced at the hearing conducted herein.

The appellant has filed refund claims for income taxes alleged to have been overpaid for tax years 1977 through 1992. The statute of limitation within which refund claims must be filed is provided in R.C. 5747.11 which provides in pertinent part:

"Applications for refund shall be filed with the tax commissioner, on the form

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The final determination for tax year 1979 lists the date of appellants' Application for Personal Income Tax Refund as June 14, 1994. Their 1979 Ohio income tax return was filed in April, 1980.

The final determination for tax year 1980 lists the date of appellants' Application for Personal Income Tax Refund as June 14, 1994. Their 1980 Ohio income tax return was filed in May, 1981.

The final determination for tax year 1981 lists the date of appellants' Application for Personal Income Tax Refund as June 14, 1994. Their 1981 Ohio income tax return was due to be filed by April 15, 1982.

The final determination for tax years 1982 through 1992 lists the date of appellants' Application for Personal Income Tax Refund as June 21, 1994.

prescribed by him, within four years from the date of the illegal, erroneous, or excessive payment of the tax, . . . ."

R.C. 5747.11 has been construed by the Ohio Supreme Court in Lee v. Tracy (1995), 71 Ohio St. 3d 572, wherein the Court determined that the Tax Commissioner correctly dismissed a refund application which was not filed within four years from the date when the return should have been filed. The tax years at issue herein are from 1977 through 1992. The appellant's applications for refund were filed on June 14, 1994 and June 21, 1994. Therefore, for tax years 1977 through 1989, the refund applications were filed more than four years after the returns were due. The decision in Lee, is premised upon payments of withheld tax which had been made during the 1986 tax year, and more than four years before the refund application. Accordingly, those applications filed more than four years after the return was due and payment made cannot be considered; however, payments were made upon two assessments, nos. 282198-3831 and 285170-0190 within the limitation period. The former assessment related to the 1979 return, and thus we may have jurisdiction to consider that return.

The applications also were timely for tax years 1990 through 1992. The Tax Commissioner denied the claim for these years because the appellants failed to raise a contention as to the propriety of the amount of tax paid or stated a reason why they should be granted a refund. At the hearing conducted herein the appellant similarly failed to state why he should be granted a refund, or why the final determination of the Tax Commissioner was incorrect.

It is axiomatic that findings of the Tax Commissioner are presumptively valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121. It is incumbent upon a taxpayer challenging a decision of the Tax Commissioner to rebut that presumption and establish a right to the relief requested. Hatchadorian v. Lindley (1986), 21 Ohio St. 3d 68; Belgrade Gardens, Inc. v. Kosydar (1974), 38 Ohio St. 2d 135; Ohio Fast Freight v. Porterfield (1972), 29 Ohio St. 2d 69; Midwest Transfer Co. v. Porterfield (1968), 13 Ohio St. 2d 138; National Tube v. Glander (1952), 152 Ohio St. 407. When no competent and/or probative evidence is developed and properly presented to this Board to establish that the Tax Commissioner's determination is clearly unreasonable or unlawful, said finding is presumed to be correct. Alcan Aluminum Corp. v. Limbach, supra; Hatchadorian v. Lindley, supra.

At the outset, we must comment on the fact that at the various returns upon which Mr. Greene seeks refunds commence with the year 1977. The refund applications represent the first formal administrative relief sought by the taxpayer. During the period from 1977 to 1981, the Tax Commissioner issued three assessments. Unfortunately, Mr. Greene did not contest any of these assessments by petition for reassessment. Finally, when these matters first formally came before the Tax Commissioner, the tax returns had been destroyed. Mr. Greene also does not have copies of the returns from which he might demonstrate the claimed error on the part of the Commissioner. At the hearing before the Board, Mr. Greene was unable to describe what disputed matters gave rise to any of his claims.

The only records we find in the statutory transcript that are helpful, is a document headed FILING HISTORY at pages 10 and 11, and a copy of a 1979 VARIANCE ASSESSMENT issued against Mr. Greene. The variance assessment indicates that on line 15 of the 1979 return, there was a claimed overpayment of \$827.99, a refund of \$810.22 was paid, and the balance \$17.77 was to be credited to 1980 state income tax liability. The return as filed was corrected by the Tax Commissioner with increased tax due to \$842.18, which reflects the claimed overpayment from the 1979 return as filed, and the calculated tax due of \$14.19. When this sum was not paid, it was assessed. Unfortunately, Mr. Greene did not file a petition for reassessment as provided by R.C. 5747.13, and the assessment became final and subject to collection which occurred. At the hearing before the Board, Mr. Greene admitted to receiving \$810.22 by check from the state. (R. 16, 37) Nowhere in the record, however, is there any justification by Mr. Greene that he was actually entitled to this refund amount, which was claimed upon the 1979 return. It is certainly regrettable that this matter has continued over this extended period of time, and that it was never resolved through the normal administrative process.

We have carefully reviewed the record in this proceeding; and we find no evidence submitted by Mr. Greene which shows that the final determination of the Tax Commissioner was not correct. It is therefore ORDERED that the final determination be, and the same is, hereby affirmed. ohiosearchkeybta