Supreme Court of Ohio Clerk of Court - Filed October 31, 2014 - Case No. 2014-1893

IN THE SUPREME COURT OF OHIO

James B. & Tina D. Renacci,	)	Appeal from the Ohio Board
	)	of Tax Appeals
Appellants,	)	
	)	Board of Tax Appeals
vs.	)	Case No. 2012-1850
	)	
Joseph W. Testa,	)	
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

NOTICE OF APPEAL OF APPELLANTS JAMES B. & TINA D. RENACCI

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Counsel for Appellee,
Joseph W. Testa, Tax Commissioner

NOTICE OF APPEAL OF APPELLANTS, JAMES B. & TINA D. RENACCI

Appellants, James B. and Tina D. Renacci, hereby give notice of their appeal as of right, pursuant to R.C. 5717.04, to the Ohio Supreme Court from the Decision and Order of the Board of Tax Appeals ("Board"), in Case No. 2012-1850 journalized on October 1, 2014. A true copy of the Decision and Order of the Board being appealed is attached as Exhibit A and incorporated herein by reference.

Appellants complain of the following errors in the Board's Decision and Order:

1. The Board erred in finding that the Tax Commissioner reasonably found that Appellants acted with willful neglect and not in good faith by not following the Tax Commissioner's newly-announced policy concerning whether income earned by an "electing small business trust" (ESBT) was taxable. The proper standard for willful neglect and good faith was to consider the Tax Commissioner's history of practices and policies with respect to income earned from an ESBT, as well as Appellants' reasonable reliance on relevant authorities, and whether Appellants acted reasonably, in good faith and not as a result of willful neglect through their full and timely disclosure of income from their ESBT to the Tax Commissioner while the Tax Commissioner's policy was still in dispute.

2. The Board erred in finding that the Tax Commissioner did not abuse his discretion in not abating the penalty and interest, so as to result in a refund.

3. The Board erred in finding that the Tax Commissioner did not abuse his discretion in not abating the penalty and interest since Appellants acted reasonably, and not as the result of willful neglect, when they excluded the income at issue from their taxable income.

4. The refusal of the Tax Commissioner to abate the penalty and interest constitutes a taking without the right to due process of law as guaranteed by both the United States' and Ohio Constitutions.

5. The Board erred and abused its discretion by not permitting testimony of former Ohio Department of Taxation personnel, Thomas M. Zaino and Jeffrey P. Sherman, and current Ohio Department of Taxation employee, Margaret Brewer, about policies of the Tax Commissioner of Ohio and Ohio Department of Taxation concerning whether income earned by an "electing small business trust" (ESBT) was considered taxable for tax years ending prior to and after December 29, 2000, as well as how those policies were enforced or not enforced.

6. The Board erred and abused its discretion by not permitting pre-hearing depositions of former Ohio Department of Taxation personnel, Thomas M. Zaino, Carol Bessey and Jeffrey P. Sherman, and current Ohio Department of Taxation employee, Margaret Brewer, which were noticed and scheduled via valid subpoenas.

7. The Tax Commissioner's requirement of the Appellants to pay tax before pursuing an appeal of the Tax Commissioner's decision, or else face a penalty, constitutes a taking without the right to due process of law as guaranteed by both the United States' and Ohio Constitutions.

Respectfully submitted,

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Counsel for Appellants,
James B. and Tina D. Renacci

AK3:1180712_v2

OHIO BOARD OF TAX APPEALS

JAMES B. & TINA D. RENACCI, (et. al.), Appellant(s), vs. JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.), Appellee(s).	CASE NO(S). 2012-1850 (PERSONAL INCOME TAX) DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - JAMES B. & TINA D. RENACCI
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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30 EAST BROAD STREET, 25TH FL
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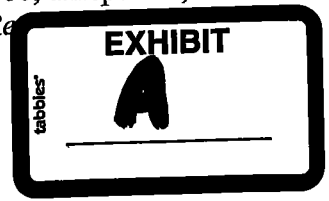
Entered Wednesday, October 1, 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellants appeal a final determination of the Tax Commissioner wherein he denied appellants' application for refund of penalties paid in connection with an individual income tax assessment for tax year 2000. We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of the hearing before this board ("H.R."), and the parties' briefs.

The underlying individual income tax assessment in this matter relates to appellants' failure to pay tax attributable to income earned by the James Renacci Electing Small Business Trust ("ESBT"). As part of the assessment, the commissioner imposed the maximum allowable penalty under R.C. 5747.15(A)(2) – twice the applicable interest charged for the delinquent payment. The assessment, including tax, interest, and penalty, was affirmed by the commissioner and by this board in 2006 and 2007, respectively. In this board's decision, we found that appellants failed to properly specify error with regard to the commissioner's imposition of penalties and therefore failed to invoke our jurisdiction to consider whether the commissioner abused his discretion in doing so. *Renacci v. Wilkins* (May 18, 2007), BTA No. 2006-Z-780, unreported, appeal voluntarily dismissed, 9th Dist. No. 07CA0001-M, unreported (Mar. 17, 2008) ("*Re*



Appellants thereafter paid the assessment liability and filed an application for personal income tax refund for the amount of the penalties imposed with the assessment. In their application, appellants argued that the commissioner abused his discretion in imposing the maximum allowable penalty, because of tax practitioner's differing views on how ESBT income should properly be taxed. S.T. at 11. The commissioner, in his final determination, notes that appellants acknowledged that the Ohio Department of Taxation changed its policy regarding ESBT income with an Information Release dated January 19, 2000. However, appellants failed to file their 2000 individual income tax return in conformance with the new position. Finding that appellants "willfully filed their return contrary to a clear Department position," of which all taxpayers "were explicitly made aware in the aforementioned Information Release," and therefore failed to act in good faith, the commissioner denied the refund claim.

On appeal, appellants again argue that they acted reasonably, and not as the result of willful neglect, when they excluded the ESBT income at issue, that the commissioner abused his discretion in not abating the penalty, and that the refusal to abate the penalty constituted a taking without due process.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Initially, we must address the argument raised by the commissioner that appellants' claim is jurisdictionally barred. Specifically, the commissioner argues that the relief sought by appellants in this matter pursuant to the application for refund, i.e., remission of penalty, is the same relief sought by appellants in its earlier, finally adjudicated petition for reassessment. The commissioner argues that the "tax refund statute, R.C. 5747.11, does *not* afford taxpayers with the right to penalty remission; instead, taxpayers must timely request penalty remission pursuant to their petitions for reassessment, under R.C. 5747.13." Appellee's Brief at 8 (emphasis sic). R.C. 5747.11, prior to being amended in 2013, stated, in pertinent part:

> "(A) The tax commissioner shall refund to employers, qualifying entities, or taxpayers, with respect to any tax imposed under section 5733.41, 5747.02, or 5747.41, or Chapter 5748 of the Revised Code:
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> "(1) Overpayments of more than one dollar;
>
> "(2) Amounts in excess of one dollar paid illegally or erroneously;
>
> "(3) Amounts in excess of one dollar paid on an illegal, erroneous, or excessive assessment."

The commissioner argues that the penalty now sought to be refunded was not illegal, erroneous, or excessive, as it was imposed within his discretion pursuant to R.C. 5747.15(A)(2). Further, the commissioner indicates in his brief that he has an established administrative practice of jurisdictionally barring penalty remission requests pursuant to an income tax refund, as evidenced by the absence of case law involving such a factual scenario. Appellee's Brief at 9. Finally, the commissioner argues that allowing a taxpayer to seek penalty remission through a refund claim "would allow the taxpayer to end-run the jurisdictional requirements for perfecting a petition for reassessment pursuant to former R.C. 5747.13(E)(1), impermissibly rendering the tax pre-payment requirement of that statutory provision meaningless." Id. at 10.

In response, the appellants argue the jurisdictional argument now raised by the commissioner directly contradicts his earlier actions, including issuing a final determination on the merits of the refund claim

without raising procedural errors, and indicating in settlement discussions related to the prior case, *Renacci I*, that such procedure would be appropriate. Appellants' Reply Brief at 3-4; H.R., Ex. 13.

The subject matter jurisdiction of this board may be raised at any point during the proceedings. *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision* (1997), 78 Ohio St.3d 459; *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St.3d 14; *Gates Mills Investment Co. v. Parks* (1971), 25 Ohio St.2d 16, 19-20 ("The failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver, which would have the force of investing subject-matter jurisdiction in a court which has no such jurisdiction.")

This board has previously held that an application for refund is an improper vehicle for requesting remission of penalties when a petition for reassessment has not first been filed. See, e.g., *Clarkson v. Tracy* (Aug. 29, 1997), BTA No. 1997-S-135, unreported; *Tenbrink v. Tracy* (Dec. 8, 1995), BTA No. 1995-R-181, unreported; *Stevens v. Tracy* (Oct. 20, 1995), BTA No. 1994-H-1166, unreported. Herein, a petition for reassessment was previously filed.

Although not raised in either party's brief, we find the language of R.C. 5703.60(A)(3) dispositive of the jurisdictional issue raised by the commissioner. That section states, generally, that the commissioner should review a petition for reassessment and may either cancel the assessment or issue a final determination that reduces, affirms, or increases the assessment; such final determination is then subject to appeal pursuant to R.C. 5717.02. It then goes on to state:

> "Only objections decided on the merits by the board of tax appeals or a court shall be given the effect of collateral estoppel or res judicata in considering an application for refund of amounts paid pursuant to the assessment or corrected assessment."

Such language clearly contemplates that the filing and final adjudication of a petition for reassessment can be followed by the filing of an application for refund, subject to one caveat – that objections decided on the merits on appeal of the petition for reassessment may not be re-litigated through an application for refund. It is clear from this board's decision in *Renacci I* that appellants' objections to the commissioner's imposition of penalties related to the underlying assessment were not reached by this board (or on appeal at the appellate court). We therefore find that, pursuant to R.C. 5703.60(A)(3), this board properly has jurisdiction to consider appellants' objections to the penalties as raised through their application for refund.

Turning to the merits of appellants' case, we note that "[r]emission of the penalty is discretionary. *** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred." *Jennings & Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70. Further, in *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, ¶16, the court specifically held that under an abuse of discretion standard of review, "it is [an appellant's] burden to show 'more than an error of law or judgment'; the appellant must show that in denying the abatement, the Tax Commissioner's 'attitude is unreasonable, arbitrary or unconscionable.'" The court explained in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, that "an abuse of discretion involves far more than a difference in *** opinion ***. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." See, also, *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83.

As noted in the final determination, the double interest penalty imposed upon appellants in relation to the underlying assessment was imposed because appellants "willfully filed their return contrary to a clear Department position." S.T. at 2. Appellants argue that they acted reasonably, and not as the result of willful neglect, by relying on the commissioner's position prior to January 19, 2000 that ESBT grantor trust income was not taxable to the grantor, in the absence of any intervening change in law or IRS regulation, or

a definitive ruling on the issue by the Supreme Court. S.T. at 14. They further argue that the commissioner acted arbitrarily in choosing to abate penalties for taxpayers who paid taxes and interest on income from ESBT grantor trusts prior to assessment, but not for those who chose to exercise their appeal rights through a petition for reassessment. Appellants' Brief at 14.

Appellants primarily cite three decisions in support of their arguments. First, they cite *Frankelite Company v. Lindley* (1986), 28 Ohio St.3d 29, where the court found an abuse of discretion where a taxpayer had made honest and sincere attempts to comply with its sales tax obligations. Second, they cite *Kilbarger Constr., Inc. v. Limbach*, 4th Dist. No. 450, unreported (Apr. 14, 1987), affirmed, 37 Ohio St.3d 234, where the taxpayer relied in good faith on a court decision. Third, they cite *Smink Electric, Inc. v. Wilkins* (Jan. 19, 2007), BTA No. 2005-B-1277, unreported, vacated on appeal, 115 Ohio St.3d 1426, where this board found a taxpayer had acted in "exceptional good faith."

We find all these cases distinguishable from the facts of the present matter. The commissioner, in his January 19, 2000 information release provided clear direction as to his change in policy regarding the taxation of income to grantors of ESBT trusts. While appellants may have disagreed with the commissioner's change in policy, their failure to follow the commissioner's clear instructions was reasonably found by the commissioner to be willful neglect, and not action in good faith. Moreover, the commissioner anticipated such disagreement in the information release, and provided instructions on the procedure to avoid statutory fraud penalties. Information Release PIT 2001-04 ("The Department will also assess statutory fraud penalties on those taxpayers whose income tax returns do not contain a clearly identifiable and prominently displayed notice that the taxpayer was not complying with the requirements of the January 19, 2000 information release"). Appellants cite only the *absence* of IRS regulation on the issue, and reliance on the dissent in a case that occurred six years after the tax year at issue, see *Knust v. Wilkins*, 111 Ohio St.3d 331, 2006-Ohio-5701, as evidence of their "good faith" in this matter. We find no abuse of discretion in the commissioner's determination that appellants acted with willful neglect and that imposition of a double interest penalty was appropriate.

We note that appellants object to the limitation of testimony at this board's hearing from the prior Tax Commissioner and a former Department of Taxation employee. We find the testimony sought to be elicited from both witnesses was not relevant to our determination, and, accordingly, overrule the objections. We further find the exhibit the commissioner attempted to introduce outside the hearing context to be of little relevance to our determination of this matter, and hereby sustain appellants' objection to its receipt into evidence.

Finally, we note that appellants raised in their notice of appeal and briefs constitutional arguments regarding due process under the U.S. and Ohio constitutions. While the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that this board has no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Therefore, we acknowledge appellants' constitutional claims on appeal, but make no findings in relation thereto.

Based upon the foregoing, we find that appellants have failed to meet their burden to prove an abuse of discretion by the commissioner. Accordingly, we find that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

A.J. Groeber, Board Secretary

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Appeal Year: 2012 | Appeal Number: 1850 | Case Name: JAMES B. & TINA D. RENACCI VS. JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

Phase:
Award

Stage:
Decision Published

Party Details

Appellant (s)
1 . JAMES B. & TINA D. RENACCI

Appellee (s)
1 . JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

Filing Date : 26-Jun-2012

Appealed Decision Type : Ohio Tax Commissioner

Tasks0 | Actions

Timeline View | Documents | Case Details

NAME	DOCUMENT TYPE	ROLE	DATE OF SUBMISSION	STATUS	ACTIONS
Renacci Notice of Appeal - Ohio Supreme Court.pdf	Case Document Submission	Appellant Representative	31-Oct-2014 01:49PM	Active	
UploadedDecision_2014-10-01_12:22:54.pdf	Decision	Clerk - Decision / Order	01-Oct-2014 12:22PM	Active	
RENACCI REPLY BRIEF 6.23.14.pdf	AppellantBrief	Docketing E-File	24-Jun-2014 09:03AM	Active	
2012-1850.pdf	Decision	Ohio BTA Admin	17-May-2014 03:25PM		
2012-1850INT0225.pdf	Decision-Interim	Ohio BTA Admin	17-May-2014 03:25PM		
2012-1850INT0327.pdf	Decision-Interim	Ohio BTA Admin	17-May-2014 03:25PM		

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Represented by:
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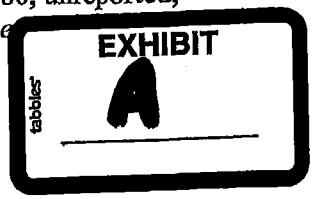

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>
> "(3) Amounts in excess of one dollar paid on an illegal, erroneous, or excessive assessment."

The commissioner argues that the penalty now sought to be refunded was not illegal, erroneous, or excessive, as it was imposed within his discretion pursuant to R.C. 5747.15(A)(2). Further, the commissioner indicates in his brief that he has an established administrative practice of jurisdictionally barring penalty remission requests pursuant to an income tax refund, as evidenced by the absence of case law involving such a factual scenario. Appellee's Brief at 9. Finally, the commissioner argues that allowing a taxpayer to seek penalty remission through a refund claim "would allow the taxpayer to end-run the jurisdictional requirements for perfecting a petition for reassessment pursuant to former R.C. 5747.13(E)(1), impermissibly rendering the tax pre-payment requirement of that statutory provision meaningless." Id. at 10.

In response, the appellants argue the jurisdictional argument now raised by the commissioner directly contradicts his earlier actions, including issuing a final determination on the merits of the refund claim

without raising procedural errors, and indicating in settlement discussions related to the prior case, *Renacci I*, that such procedure would be appropriate. Appellants' Reply Brief at 3-4; H.R., Ex. 13.

The subject matter jurisdiction of this board may be raised at any point during the proceedings. *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision* (1997), 78 Ohio St.3d 459; *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St.3d 14; *Gates Mills Investment Co. v. Parks* (1971), 25 Ohio St.2d 16, 19-20 ("The failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver, which would have the force of investing subject-matter jurisdiction in a court which has no such jurisdiction.")

This board has previously held that an application for refund is an improper vehicle for requesting remission of penalties when a petition for reassessment has not first been filed. See, e.g., *Clarkson v. Tracy* (Aug. 29, 1997), BTA No. 1997-S-135, unreported; *Tenbrink v. Tracy* (Dec. 8, 1995), BTA No. 1995-R-181, unreported; *Stevens v. Tracy* (Oct. 20, 1995), BTA No. 1994-H-1166, unreported. Herein, a petition for reassessment was previously filed.

Although not raised in either party's brief, we find the language of R.C. 5703.60(A)(3) dispositive of the jurisdictional issue raised by the commissioner. That section states, generally, that the commissioner should review a petition for reassessment and may either cancel the assessment or issue a final determination that reduces, affirms, or increases the assessment; such final determination is then subject to appeal pursuant to R.C. 5717.02. It then goes on to state:

> "Only objections decided on the merits by the board of tax appeals or a court shall be given the effect of collateral estoppel or res judicata in considering an application for refund of amounts paid pursuant to the assessment or corrected assessment."

Such language clearly contemplates that the filing and final adjudication of a petition for reassessment can be followed by the filing of an application for refund, subject to one caveat – that objections decided on the merits on appeal of the petition for reassessment may not be re-litigated through an application for refund. It is clear from this board's decision in *Renacci I* that appellants' objections to the commissioner's imposition of penalties related to the underlying assessment were not reached by this board (or on appeal at the appellate court). We therefore find that, pursuant to R.C. 5703.60(A)(3), this board properly has jurisdiction to consider appellants' objections to the penalties as raised through their application for refund.

Turning to the merits of appellants' case, we note that "[r]emission of the penalty is discretionary. *** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred." *Jennings & Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70. Further, in *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, ¶16, the court specifically held that under an abuse of discretion standard of review, "it is [an appellant's] burden to show 'more than an error of law or judgment'; the appellant must show that in denying the abatement, the Tax Commissioner's 'attitude is unreasonable, arbitrary or unconscionable.'" The court explained in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, that "an abuse of discretion involves far more than a difference in *** opinion ***. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." See, also, *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83.

As noted in the final determination, the double interest penalty imposed upon appellants in relation to the underlying assessment was imposed because appellants "willfully filed their return contrary to a clear Department position." S.T. at 2. Appellants argue that they acted reasonably, and not as the result of willful neglect, by relying on the commissioner's position prior to January 19, 2000 that ESBT grantor trust income was not taxable to the grantor, in the absence of any intervening change in law or IRS regulation, or

a definitive ruling on the issue by the Supreme Court. S.T. at 14. They further argue that the commissioner acted arbitrarily in choosing to abate penalties for taxpayers who paid taxes and interest on income from ESBT grantor trusts prior to assessment, but not for those who chose to exercise their appeal rights through a petition for reassessment. Appellants' Brief at 14.

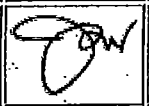
Appellants primarily cite three decisions in support of their arguments. First, they cite *Frankelite Company v. Lindley* (1986), 28 Ohio St.3d 29, where the court found an abuse of discretion where a taxpayer had made honest and sincere attempts to comply with its sales tax obligations. Second, they cite *Kilbarger Constr., Inc. v. Limbach*, 4th Dist. No. 450, unreported (Apr. 14, 1987), affirmed, 37 Ohio St.3d 234, where the taxpayer relied in good faith on a court decision. Third, they cite *Smink Electric, Inc. v. Wilkins* (Jan. 19, 2007), BTA No. 2005-B-1277, unreported, vacated on appeal, 115 Ohio St.3d 1426, where this board found a taxpayer had acted in "exceptional good faith."

We find all these cases distinguishable from the facts of the present matter. The commissioner, in his January 19, 2000 information release provided clear direction as to his change in policy regarding the taxation of income to grantors of ESBT trusts. While appellants may have disagreed with the commissioner's change in policy, their failure to follow the commissioner's clear instructions was reasonably found by the commissioner to be willful neglect, and not action in good faith. Moreover, the commissioner anticipated such disagreement in the information release, and provided instructions on the procedure to avoid statutory fraud penalties. Information Release PIT 2001-04 ("The Department will also assess statutory fraud penalties on those taxpayers whose income tax returns do not contain a clearly identifiable and prominently displayed notice that the taxpayer was not complying with the requirements of the January 19, 2000 information release"). Appellants cite only the *absence* of IRS regulation on the issue, and reliance on the dissent in a case that occurred six years after the tax year at issue, see *Knust v. Wilkins*, 111 Ohio St.3d 331, 2006-Ohio-5701, as evidence of their "good faith" in this matter. We find no abuse of discretion in the commissioner's determination that appellants acted with willful neglect and that imposition of a double interest penalty was appropriate.

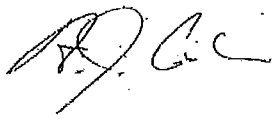
We note that appellants object to the limitation of testimony at this board's hearing from the prior Tax Commissioner and a former Department of Taxation employee. We find the testimony sought to be elicited from both witnesses was not relevant to our determination, and, accordingly, overrule the objections. We further find the exhibit the commissioner attempted to introduce outside the hearing context to be of little relevance to our determination of this matter, and hereby sustain appellants' objection to its receipt into evidence.

Finally, we note that appellants raised in their notice of appeal and briefs constitutional arguments regarding due process under the U.S. and Ohio constitutions. While the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that this board has no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Therefore, we acknowledge appellants' constitutional claims on appeal, but make no findings in relation thereto.

Based upon the foregoing, we find that appellants have failed to meet their burden to prove an abuse of discretion by the commissioner. Accordingly, we find that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary