

IN THE SUPREME COURT OF OHIO

JAMES B. & TINA D. RENACCI	)	Supreme Court Case No. 2014-1893
)	
Appellants	)	On Appeal from the Ohio Board of
	)	Tax Appeals
v.)	
)	
JOSEPH W. TESTA,	)	Case No. 2012-1850
TAX COMMISSIONER OF OHIO)	
)	
Appellee)	

MERIT BRIEF OF APPELLANTS JAMES B. AND TINA D. RENACCI

Steven A. Dimengo (0037194)
Matthew R. Duncan (0076420)
Buckingham, Doolittle & Burroughs, LLC
3800 Embassy Pkwy., Suite 300
Akron, OH 443333
(330) 376-5300
(330) 252-5523 (facsimile)
sdimengo@bdblaw.com
mduncan@bdblaw.com

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

Mike De Wine, Attorney General of Ohio
Barton A. Hubbard, Assistant Attorney
General
30 East Broad Street, 25th Floor
Columbus, OH 43215
(614) 466-5967
(614) 466-8226 (facsimile)
barton.hubbard@ohioattorneygeneral.gov

*Counsel for Appellee, Joseph W. Testa
Tax Commissioner of Ohio*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE FACTS 1

 A. Relevant, Underlying Facts 1

 1. Pre-Tax Year 2000 Treatment Of Grantor Trusts Electing 1

 2. Change In Treatment Of Grantor Trusts Making ESBT Elections Effective For Tax Year 2000..... 3

 3. Tax Treatment Of Income From The James B. Renacci Trust - 1998..... 5

 B. Procedural History 8

II. LAW AND ARGUMENT..... 11

 A. The BTA Erred In Finding That The Tax Commissioner Reasonably Found That The Renaccis Acted With Willful Neglect And Not In Good Faith By Not Following The Tax Commissioner’s Policy Change On The Taxation Of ESBT Income. 11

 B. The BTA 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 Since The Renaccis Acted Reasonably, And Not As The Result Of Willful Neglect, When They Excluded The ESBT Income From Their Taxable Income. 14

 C. The Tax Commissioner’s Conditioning Penalty Abatement Upon Receiving Payment And Waiver Of Appeal Rights Was An Abuse Of Discretion And A Taking Without The Right To Due Process Of Law. 19

 D. The BTA Erred And Abused Its Discretion By Not Permitting Pre-Hearing Depositions Of Former And Current Ohio Department Of Taxation Personnel..... 22

 E. The BTA Erred And Abused Its Discretion By Not Permitting Hearing Testimony Of Former And Current Ohio Department Of Taxation Personnel About Policies Of The Tax Commissioner And Department Of Taxation Concerning Whether Income Earned By An 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. 23

 F. The Tax Commissioner’s Assignments Of Error Alleging That The BTA Was Without Jurisdiction To Hear The Renaccis’ Appeal Are Without Merit. 25

III. CONCLUSION..... 32

CERTIFICATE OF SERVICE 34

APPENDIX 35

TABLE OF AUTHORITIES

Cases

Crown Communication, Inc. v. Testa (2013), 136 Ohio St.3d 209, ¶ 3128

Frankelite Company v. Lindley (1986), 28 Ohio St.3d 29 11, 12, 13

Gibson v. Limbach (April 24, 1992), Ohio BTA No. 89-F-28712

Grace Chapel v. Levin (May 4, 2010), BTA No. 2007-K-835, 2010 WL 1832532, unreported30,
31

Hill v. Tracy, BTA Case No. 99-K-145 (July 30, 1999).....21

Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83, 8712

Insurance corp. of Ireland v. Compagnie des Bauxites de Guinee (1982), 456 U.S. 694, 70717

Jennings & Churella Construction Co. v. Lindley (1984), 10 Ohio St.3d 67, 70 12, 13, 16

Kilbarger Construction, Inc. v. Limbach (April 14, 1987), 4th Dist. C.A. No. 450, 1987 WL 9755,
unreported at *3 15, 16

Knust v. Wilkins (2006), 111 Ohio St.3d 331, 337-3385, 8

Lovell v. Levin (2007), 116 Ohio St.3d 200..... 5, 8, 9, 18, 20

Molchan v. Williams (June 26, 2003), 8th Dist. C.A. No. 81653, 2003 WL 2146913717

Mt. Sinai v. Wilkins (February 2, 2010), BTA No. 2006-M-2129, 2010 WL 415427, unreported .30,
31

NLO, Inc. v. Limbach, BTA Case Nos. 88-K-1115 and 88-K-1116 (June 30, 1992).....21

NLRB v. Sears, Roebuck & Co. 421 U.S. 132, 151 (1975).....25

Oikos Community Dev. Corp. v. Zaino (November 9, 2001), BTA No. 2000-T-2037, unreported.30

Prince v. Zaino (Interim Order, February 11, 2005) Case No. 2003-T-51425

State ex rel. Dist. 1199 v. Gulyassy (1995), 107 Ohio App.3d 72925

State ex rel. James v. Ohio State Univ. (1994), 70 Ohio St.3d 168, 17225

State v. Jenkins (1984), 15 Ohio St.3d 164, 22212

The Pullman Co. v. Limbach (Interim Order, May 17, 1991), BTA No. 1990-D-42725

Statutes

R.C. 5703.60(A)(3) 10, 31, 32

R.C. 5709.12.....30

R.C. 5717.02.....31

R.C. 5717.04.....13

R.C. 5747.11(A)(3)29

R.C. 5747.11(B) 29, 32

R.C. 5747.13.....19

R.C. 5747.13(E) and (F).....19

R.C. 5747.13(F).....19

R.C. 5747.15.....14

R.C. 5747.15(C) 12, 19

Other Authorities

Ohio Department of Taxation Information Release IT-2000-01 (January 19, 2000)3, 4, 15, 16, 17,
18

Ohio Department of Taxation Information Release PIT 2002-04 (July 3, 2002) 4, 18, 20

Treasury Regulation 1.641(c)-1(k).....5, 14

I. STATEMENT OF THE FACTS

A. RELEVANT, UNDERLYING FACTS

1. PRE-TAX YEAR 2000 TREATMENT OF GRANTOR TRUSTS ELECTING SMALL BUSINESS TRUST (“ESBT”) STATUS.

After 1996, an electing small business trust (“ESBT”) became a permissible shareholder of an S Corporation. Under federal tax rules, an ESBT is a separate taxpayer, paying tax at the highest marginal income tax rate on the income allocated to it. For taxable years prior to 2000, Ohio did not tax the income of trusts, except income of a grantor trust was taxed to the grantor. However, before 2000, the Ohio Tax Commissioner did not assert that the income of a grantor trust that made an ESBT election was taxable to the grantor, but accepted that the income was nontaxable through recognition of the trust as a separate nontaxable taxpayer.

Prior to 2000, the Tax Commissioner’s representatives consistently made public statements that the income of grantor trusts making ESBT elections was not subject to Ohio income tax. Tax Commissioner representatives even promoted ESBTs as a valid vehicle for shielding income to be realized from the sale of an appreciated asset by simply placing such asset in a newly formed S Corporation prior to its sale and qualifying the shareholder as an ESBT. For example, Jeffrey Sherman (“Sherman”), former Legal Counsel for the Income Tax Division of the Ohio Department of Taxation, made presentations at the Ohio Tax Conference prior to 2000 in which he made statements about the taxability of income of grantor trusts that made an ESBT election,¹ and further acknowledged:

Q: What’s your recollection as you sit here today of what you said at the Ohio Tax Conference?

¹ March 3, 2014 Board of Tax Appeals Hearing Transcript (“Hearing Transcript”), p. 199:22-200:5

A: My recollection, as I sit here today, was to point out to the folks in the audience that the department was not taxing [ESBT] income on the individual income.²

Likewise, Carol Bessey, former Deputy Commissioner Over Policy of the Ohio Department of Taxation, stated in a published article concerning ESBTs: “There’s an opportunity here to use this mechanism to avoid taxation...”³

While he was a partner specializing in state and local tax law with PricewaterhouseCoopers, LLP, accountant and soon-to-be Tax Commissioner, Thomas Zaino (“Zaino”), agreed: “My firm has not gone out and tried to mass-market this as a tax strategy as some have. But some firms have taken advantage of this, absolutely... .”⁴ At the hearing before the Board of Tax Appeals (“BTA”) on March 3, 2014 (“Hearing”), Zaino acknowledged that prior to the tax year 2000, grantor trust ESBT elections were a widely-used strategy to achieve tax savings:

Q: And why was it that your firm, PricewaterhouseCoopers, did not mass market the use of ESBTs as a tax strategy?

A: You know, that was such a long time ago that it will be hard to say exactly why we did or did not go out and mass market it. Clearly, there were some questions as to how long that tax strategy would be around if you’re going to recommend it to a taxpayer, that type of thing.

Q: Why was that?

A: Because it was a – could be a significant revenue hit and a tax savings for taxpayers. So you would presume that the State would try and eliminate that loophole, so to speak.⁵

² Hearing Transcript, p. 200:17-22.

³ Hearing Transcript, p. 175:24-176:11.

⁴ Hearing Transcript, p. 162:14-163:2.

⁵ Hearing Transcript, p. 163:3-18.

Although the Ohio General Assembly considered legislation in 1998 to “eliminate that loophole” and tax income of an ESBT, the legislation did not pass.⁶ Nor was federal tax policy changed by the IRS to make individuals liable for taxes on income generated by grantor trusts making ESBT elections prior to tax year 2000. Accordingly, the Tax Commissioner did not impose Ohio personal income taxes on income generated by grantor trusts making ESBT elections prior to tax year 2000, as acknowledged by Sherman:

Q: But is it your recollection, as you sit here today, outside of even the seminar we’re talking about, but is it your recollection that the Ohio Department of Taxation was not enforcing income taxes against income generated by grantor trusts that made the ESBT election prior to the information release issued in January 2000?

A: Yes.⁷

2. CHANGE IN TREATMENT OF GRANTOR TRUSTS MAKING ESBT ELECTIONS EFFECTIVE FOR TAX YEAR 2000.

In a policy change by new Tax Commissioner Zaino, on January 19, 2000, the Tax Commissioner announced, via Information Release IT-2000-01 (the “2000 Release”), that income generated by grantor trusts making ESBT elections must be included in a grantor’s taxable income effective for post-1999 tax years. This change in policy was not preceded by any change in federal or Ohio law. In pertinent part, the 2000 Release provided:

Effective for individual and estate taxable years beginning after December 31, 1999, the Income Tax Audit Division will require certain individuals and estates to include in their federal adjusted gross income (“FAGI”) and Ohio taxable income all relevant pass-through items of income, gain or loss from S corporations when such items have been treated as reportable for federal income tax purposes on a trust’s fiduciary income tax return (Form 1041) because the trust has elected to be

⁶ Hearing Transcript, p. 176:20-178:8.

⁷ Hearing Transcript, p. 208:4-11.

taxed as an Electing Small Business Trust (“ESBT”) under Internal Revenue Code (“IRC”) section 1361(e)(3).⁸

When asked about the effect of this policy change for ESBT income, Zaino testified: “...I think the policy was to be reflected in the – in the information release, and I think it is reflected in the information release that on a go-forward basis folks had to come forward and treat the grantor trusts that chose to make an ESBT election as a grantor trust.”⁹

On July 3, 2002, the Tax Commissioner issued another Information Release (the “2002 Release”) initiating “...an audit program to identify and assess individuals who are not ‘adding back’ to their federal adjusted gross income (“FAGI”) their distributive shares of S corporation profit which they receive via a trust qualifying as both an electing small business trust (“ESBT”) and a grantor trust.”¹⁰ Furthermore, the 2002 Release provided that the Ohio Department of Taxation would issue assessments for tax, interest, and a double interest penalty for taxpayers that were grantors of trusts that elected ESBT status if they failed to report the income on their tax-year 2000 Ohio income tax return.¹¹ In addition, “[t]he 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.”¹²

After the 2000 and 2002 Releases were issued, several taxpayers challenged the policy change for ESBT income since no change in relevant Ohio or federal law authorized the Tax Commissioner’s policy in the 2000 Release. In November 2006, the Ohio Supreme Court issued

⁸ Hearing Exhibit “3”, Ohio Department of Taxation Information Release IT-2000-01 (January 19, 2000), p.1, ¶ 1.

⁹ Hearing Transcript, p. 185:25-186:6 (Emphasis added).

¹⁰ Ohio Department of Taxation Information Release PIT 2002-04 (July 3, 2002) at p. 1, ¶ 1, attached to Hearing Exhibit “5”, March 25, 2003 Ohio Department of Taxation letter of assessment.

¹¹ *Id.* at p. 1, ¶ 2.

¹² *Id.*

its decision in *Knust v. Wilkins* (2006), 111 Ohio St.3d 331, holding that income from a grantor trust that made an ESBT election was taxable to the grantor rather than the trust. However, *Knust* did not definitively address whether income earned by all grantor ESBTs was taxable to the grantor. Justice O'Donnell's dissenting opinion in *Knust* took the position that a grantor trust making an ESBT election would **not** be taxable if the ESBT terminated prior to December 29, 2000 based upon the treatment of such trusts under federal law:

The trusts in question terminated on February 26, 2000, and, therefore, their taxable year ended on that date. Treasury Regulation 1.641(c)-1(k), upon which the majority relies, is "applicable for taxable years of ESBTs that end *on and after* December 29, 2000." (Emphasis added.) Section 1.641(c)-1(k), Title 26, C.F.R. Because the ESBTs had terminated prior to December 29, 2000, the Treasury Regulation does not apply to them. The majority attempts to circumvent this regulation and the plain language of Section 443(a) by stating that David and Susan "offered no separate tax returns suggesting that they treated the taxable year for the ESBTs as having ended on any date earlier than December 31, 2000." In my view, this point is not persuasive, because Section 443(a) provides that a "short period" tax return "shall be made" when a taxpayer ceases to exist during a tax year. The tax year in question, therefore, terminated when the taxpayer ceased to exist regardless of the date indicated on the tax return.¹³

In November 2007, the Ohio Supreme Court issued its decision in *Lovell v. Levin* (2007), 116 Ohio St.3d 200, which specifically addressed this remaining issue and held that income of ESBTs which terminated before December 29, 2000 was also taxable to the grantor.

3. TAX TREATMENT OF INCOME FROM THE JAMES B. RENACCI TRUST - 1998.

In 1998, James Renacci established the James B. Renacci Trust – 1998 (the "Renacci Trust") and served as Grantor and Trustee of the Renacci Trust.¹⁴ The Renacci Trust qualified as

¹³ *Knust v. Wilkins* (2006), 111 Ohio St.3d 331, 337-338.

¹⁴ Affidavit of James B. Renacci filed in BTA Case No. 2012-k-1850 on April 28, 2014 ("Renacci Affidavit") at ¶ 2.

an ESBT.¹⁵ The Renacci Trust held shares of stock in three (3) S corporations - LTC Management Services, Inc.; LTC Management Services II, Inc.; and LTC Supply Corporation (collectively, the "S Corporations").¹⁶

On March 1, 2001, James Renacci filed with the Internal Revenue Service an Election Form converting the Renacci Trust from an ESBT to a qualified subchapter S trust, under §1361(d)(2) of the 1986 Internal Revenue Code, as amended. The conversion was effective December 25, 2000, thereby terminating the Renacci Trust as a separate taxpayer for federal income tax purposes.¹⁷ On December 28, 2000, James Renacci, in his capacities as Grantor and Trustee of the Renacci Trust, executed a Revocation of Trust which immediately revoked the Renacci Trust, and assigned the S Corporation shares held in the Renacci Trust to James Renacci, individually.¹⁸

For the tax year 2000, while the Tax Commissioner's new ESBT policy was still in dispute, James and Tina Renacci filed their joint Ohio personal income tax return following federal rules (as well as the Tax Commissioner's pre-2000 policy) and did not report income earned by the Renacci Trust, which had terminated before December 29, 2000.¹⁹ However, the Renaccis did not hide the existence or amount of the income applicable to the Renacci Trust. The Renaccis timely filed Forms FT-1120-S, James Renacci fully advised the Tax Commissioner as to the existence of the Renacci Trust, as well as the fact it was a shareholder of the S Corporations, and all of the income earned by the Renacci Trust that was not included in his 2000 Ohio Tax Return. Since the

¹⁵ March 3, 2014 Decision in BTA Case No. 2012-1850 ("BTA Decision") at p. 1, ¶ 2. See also, Hearing Exhibit "1", Ohio Department of Taxation Final Determination of April 26, 2012, p.1, ¶ 2.

¹⁶ Renacci Affidavit at ¶ 4.

¹⁷ Renacci Affidavit at ¶ 3.

¹⁸ Renacci Affidavit at ¶¶ 4-5.

¹⁹ *Id.*

three (3) FT-1120-S Notices of S Corporation Status filed by the Renaccis with the Ohio Department of Taxation disclosed book income,²⁰ the Renaccis actually disclosed more than actual income for personal income tax purposes.

An audit of the Renaccis' 2000 Tax Return was triggered due to the S Corporations reporting net profits on the three (3) FT-1120-S Notices of S Corporation Status with the Ohio Department of Taxation, which identified the Renacci Trust as an ESBT holding shares in the S Corporations.²¹ Thereafter, in April 2003, the Ohio Department of Taxation audited the Renaccis' IT-1040 Ohio Income Tax Return for the tax year 2000 (the "2000 Tax Return").²² On May 12, 2003, the Renaccis were assessed tax, interest and a double-interest penalty (approximately 31% of the tax) for tax year 2000 income generated by the Renacci Trust as an ESBT,²³ in the amounts of:

Tax	\$ 954,650
Interest	146,938
Penalty	<u>293,876</u>
TOTAL	<u>\$1,395,464</u>

As noted above, the tax year for the Renacci Trust closed on or before December 28, 2000 for three independent reasons: (1) the Renacci Trust was terminated at that time;²⁴ (2) the S Corporation stock was transferred from the Renacci Trust to James Renacci, individually at that time;²⁵ and (3) James Renacci made a qualified subchapter S trust ("QSST") election effective December 25, 2000.²⁶ Clearly, for federal income tax purposes, which defines the Ohio income

²⁰ Renacci Affidavit at ¶ 11.

²¹ *Id.*

²² Renacci Affidavit at ¶ 6.

²³ Renacci Affidavit at ¶ 7.

²⁴ Renacci Affidavit at ¶ 5.

²⁵ Renacci Affidavit at ¶ 4.

²⁶ Renacci Affidavit at ¶ 3.

tax base, the ESBT was respected as a separate taxpayer through December 25, and its income would not have been subject to Ohio income tax under the Tax Commissioner's pre-2000 policy.

B. PROCEDURAL HISTORY

In July 2003, the Renaccis filed a Petition for Reassessment to challenge the tax, interest and penalty assessment issued by the Ohio Department of Taxation. The Tax Commissioner's Final Determination (the "2003 Final Determination") affirmed the assessment, **but did not specifically address the Renaccis' request for penalty abatement.** The Renaccis then appealed the 2003 Final Determination ("2003 Appeal"). While that appeal was pending, the Ohio Supreme Court issued its decision in *Knust*, holding that, for Ohio personal income tax purposes, ESBT income was taxable to the grantor rather than the trust. Since *Knust* did not definitively address whether income earned by an ESBT grantor trust that terminated before December 29, 2000, such as the Renacci Trust, was taxable to the grantor under Treasury Regulation 1.641(c)-1(k), the Renaccis, like other similarly-situated taxpayers in the *Lovell* case, continued to pursue their appeal.

On April 17, 2007, the Tax Commissioner offered to reduce the Renaccis' penalty to 5% of the tax if the Renaccis paid the tax, interest, and reduced penalty in less than two (2) weeks by April 30, 2007.²⁷ The total payment under this proposal would have been approximately \$1.4 million. The Renaccis were willing to accept this offer, but could not make such a large payment in that short time period; they agreed the full penalty would be due if payment was not made by year end. Additionally, James Renacci was having invasive surgery at the same time.²⁸ The Tax

²⁷ Hearing Exhibit "6", April 17, 2007 email exchange between Appellee's counsel, Bart Hubbard and Appellants' counsel, Steve Dimengo.

²⁸ *Id.* and Renacci Affidavit at ¶ 8.

Commissioner claims that similar offers were made to other taxpayers with the same issue, although a longer period to pay was provided.

In November 2007, by which date the Renaccis had already voluntarily paid substantially all of the assessed tax and interest, the Ohio Supreme Court's decision in *Lovell v. Levin* (2007), 116 Ohio St.3d 200 finally made clear that income from an ESBT which terminated before December 29, 2000 was taxable to the grantor. The Renaccis paid the full tax and interest assessed on income generated from the Renacci Trust by making payments of \$140,000 in April 2007, \$814,650 in August 2007, and \$425,400 in December 2007.²⁹

In March 2008, the Renaccis dismissed their 2003 Appeal, without a decision having been rendered, on the condition that the Tax Commissioner agree to address penalty abatement in a separate appeal via a refund claim after the penalty was paid in full. This agreement with the Tax Commissioner was confirmed in writing on March 10, 2008.³⁰ In October 2008, the Renaccis paid the full double-interest penalty, including additional accrued interest, in the amount of \$359,822.³¹ The Renaccis then filed a refund claim on the penalty payment in May 2009, which was denied by the Tax Commissioner in a 2012 Final Determination.

The Renaccis then appealed the Tax Commissioner's 2012 Final Determination to the BTA and an evidentiary hearing was held by the BTA (Case No. 2012-1850) on March 3, 2014. The BTA issued its Decision on October 1, 2014 ("BTA Decision"). In the BTA Decision, the BTA

²⁹ Renacci Affidavit at ¶ 9.

³⁰ Hearing Exhibit "13", March 10, 2008 email exchange between Appellee's Executive Administrator of Appeals Management, Margaret Brewer and Appellants' counsel, Steve Dimengo. See also, BTA Decision at p. 3, ¶ 1.

³¹ Renacci Affidavit at ¶ 10.

correctly found that under R.C. 5703.60(A)(3), the BTA had jurisdiction to consider the Renaccis' objections to the penalties as raised through their refund application.³²

However, the BTA erred in holding that the Tax Commissioner reasonably found that the Renaccis 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 ESBT was taxable. The proper standard for willful neglect and good faith was to consider the Tax Commissioner's historic practices and policies with respect to ESBT income, as well as the Renaccis' reasonable reliance on relevant authorities, and whether the Renaccis acted reasonably, in good faith and not as a result of willful neglect through their full and timely disclosure of ESBT income to the Tax Commissioner while the Tax Commissioner's policy change was still in dispute.

The BTA also erred in finding that the Tax Commissioner did not abuse his discretion in not abating the penalty, so as to result in a refund. Additionally, the BTA erred in finding that the Tax Commissioner did not abuse his discretion in not abating the penalty since the Renaccis acted reasonably, and not as the result of willful neglect, when they excluded the income at issue from their taxable income. The refusal of the Tax Commissioner to abate the penalty constitutes a taking without the right to due process of law as guaranteed by both the United States' and Ohio Constitutions. The Tax Commissioner's conditioning of partial penalty remission on the Renaccis paying the tax and relinquishing their appeal rights also constitutes a taking without the right to due process of law, as guaranteed by both the United States' and Ohio Constitutions.

Moreover, the BTA 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

³² BTA Decision at p. 3, ¶ 5.

Commissioner and Department of Taxation concerning whether income earned by an 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. Thomas M. Zaino was to also offer testimony concerning his publicly expressed views on the taxability of ESBT income prior to becoming Tax Commissioner. The BTA also 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.

II. LAW AND ARGUMENT

A. The BTA Erred in Finding that the Tax Commissioner Reasonably Found that the Renaccis Acted with Willful Neglect and Not in Good Faith by Not Following the Tax Commissioner's Policy Change on the Taxation of ESBT Income.

The BTA erred in finding that the Tax Commissioner reasonably found that the Renaccis acted with willful neglect and not in good faith by not following the Tax Commissioner's policy change concerning the taxation of ESBT income. The proper standard for willful neglect and good faith was to consider the Tax Commissioner's historic practices and policies with respect to income earned from an ESBT, as well as the Renaccis' reasonable reliance on relevant authorities and their full and timely disclosure of ESBT income to the Tax Commissioner while the Tax Commissioner's new policy was still in dispute.³³ Instead, the BTA wrongly found that the Renaccis acted with willful neglect and not in good faith solely because they did not follow the Tax Commissioner's new policy.

³³ E.g., *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29, 33 (all evidence presented by taxpayer to establish tax exemption should be considered by the Tax Commissioner in an audit).

Pursuant to R.C. 5747.15(C), the Tax Commissioner has discretion to abate a double interest penalty "...if the taxpayer, qualifying entity, or employer shows that the failure to comply with the provisions of this chapter is due to reasonable cause and not willful neglect."³⁴ The Tax Commissioner's determination as to penalty abatement is subject to an abuse of discretion review.³⁵ The Ohio Supreme Court has defined an abuse of discretion as connoting "...a decision that is unreasonable, arbitrary or unconscionable."³⁶ The Ohio Supreme Court later expanded the definition of abuse of discretion by stating:

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.³⁷

Although a high standard, an abuse of discretion has been found when the Tax Commissioner does not abate a penalty against a taxpayer by taking the full extent of the taxpayer's history of acting in good faith into account. In *Frankelite Company v. Lindley* (1986), 28 Ohio St.3d 29, the Tax Commissioner refused to remit a penalty even though the taxpayer had a history of timely and fully paying its taxes, an established procedure to obtain exemption certificates from its customers to support exemption on its sales, and fully cooperated with the Department of Taxation during the audit. The BTA affirmed the assessment but reversed on the penalty because the Tax Commissioner abused his discretion since the record established that the taxpayer reasonably relied in good faith on such certificates. In affirming the BTA, the Ohio Supreme Court stated:

³⁴ R.C. 5747.15(C).

³⁵ *Gibson v. Limbach* (April 24, 1992), Ohio BTA No. 89-F-287.

³⁶ *Jennings & Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70.

³⁷ *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222.

In his sole proposition of law, the Tax Commissioner seeks reversal of the board's remission of the penalty. In this regard, the board held:

"The Board of Tax Appeals finds that in this particular case, the appellant [Frankelite] had sufficiently shown that the failure to remit the penalty was an abuse of discretion. Frankelite had an established history of timely filing and payment of sales tax returns. Frankelite maintained an extensive file of exemption certificates and manifested a good faith reliance on them. Frankelite fully cooperated with the tax agents during the audit and undertook a massive campaign to comply with the agents' directions and orders. In short, the record before this Board is replete with demonstrations of appellant's honest and sincere attempts to comply with the tax laws of this state. We believe that the power to remit the statutory penalty was authorized to cover situations such as this."

* * *

. . . In the case at bar, the board made such a specific finding, but the commissioner argues that the requirements for establishing an abuse of discretion as set forth in *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St. 3d 67, 70, were not met and that the board, in essence, merely substituted its own judgment for that of the commissioner.

The scope of our review of board decisions, however, as set forth in *R.C. 5717.04*, is limited to a determination of whether the board's decision is unreasonable or unlawful. Upon consideration of the reasons stated by the board and our review of the record, we cannot conclude that the board's factual determination leading to the remission of the penalty in this case was not in conformity with *Jennings & Churella Constr. Co.*, supra, or otherwise unreasonable or unlawful.³⁸

The Renaccis relied in good faith on the IRS's decision -- before December 29, 2000 -- not to issue regulations taxing income of grantor ESBT trusts to the grantors (effective on such date) and upon the Tax Commissioner's public treatment of such trusts before 2000. The Renaccis' position was further supported by Justice O'Donnell's analysis in *Knust*, and the *Knust* decision as

³⁸ *Frankelite Company v. Lindley* (1986), 28 Ohio St.3d 29, 31-32.

a whole did not definitively decide whether income earned by a grantor trust ESBT that terminated prior to December 29, 2000, such as the Renacci Trust, was taxable to the grantor under Treasury Regulation 1.641(c)-1(k). Finally, the Renaccis fully and timely disclosed their ESBT income to the Tax Commissioner. All of these factors should have been considered in determining whether the Renaccis acted with willful neglect and without good faith, rather than just whether they complied with an unsettled Tax Commissioner policy change.

If adherence to a Tax Commissioner's policy sets the standard for taxpayers' willful neglect, which it does not, the Tax Commissioner could never abate penalties because he could not find that a taxpayer acted without willful neglect and in good faith. This is because, by definition, each time a Tax Commissioner considers abating a penalty, there is a deficiency resulting from the taxpayer not following a Tax Commissioner policy. Thus, the BTA's determination that the Tax Commissioner reasonably found that the Renaccis acted with willful neglect and not in good faith only because the Commissioner's policy was not followed negates the penalty abatement provisions of R.C. 5747.15 and creates an absurd result. The BTA clearly imposed the wrong standard in determining that the Renaccis acted with willful neglect by not following a Tax Commissioner policy, especially a change from a policy that had existed for years within the Department of Taxation and was supported by federal tax law that defines the Ohio income tax base.

- B. The BTA 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 Since the Renaccis Acted Reasonably, and Not as the Result of Willful Neglect, When They Excluded the ESBT Income from Their Taxable Income.**

The reasonableness of the Renaccis' position is bolstered by a number of unique circumstances. First, the Renaccis did not hide the ESBT income from the Tax Commissioner, but instead disclosed all of the net profits of the S Corporations on FT-1120-S Notices of S Corporation Status timely filed by the Renaccis with the Ohio Department of Taxation.³⁹ Second, the Ohio State Legislature decided -- before December 29, 2000 -- not to enact legislation taxing income of grantor ESBT trusts to the grantors.⁴⁰ Third, the Tax Commissioner's policy before the 2000 Release was to not assess taxes on income of grantor ESBT trusts.⁴¹ Fourth, the Tax Commissioner did not retroactively apply his new policy set forth in the 2000 Release to income generated by grantor ESBT trusts before 2000. The 2000 Release even acknowledged that "The Income Tax Audit Division recognizes that various tax practitioners have differing interpretations of how the ESBT provisions interplay with the grantor trust provisions of the Internal Revenue Code."⁴² Finally, the Tax Commissioner chose to abate penalties for taxpayers who paid taxes and interest on income from grantor ESBT trusts who relinquished appeal rights, but did not abate penalties for taxpayers that exercised their Due Process right of appeal after assessment.

The Tax Commissioner erred by not taking any of these factors into account in refusing to abate the penalty imposed upon the Renaccis. Relying in good faith upon what is perceived to be a valid interpretation of a tax statute is a classic reason to abate a penalty. As Justice Grey of the 4th District Court of Appeals stated in his dissent in *Kilbarger Construction, Inc. v. Limbach* (April 14, 1987), 4th Dist. C.A. No. 450, 1987 WL 9755, unreported,

³⁹ Renacci Affidavit at ¶ 11.

⁴⁰ Hearing Transcript, p. 176:20-178:8.

⁴¹ Hearing Transcript, p. 200:17-22.

⁴² Hearing Exhibit "3", Ohio Department of Taxation Information Release IT-2000-01 (January 19, 2000), p.1, ¶ 5.

Having ruled on assignment of error one as I did [sustaining appellant's assignment of error], my decision on assignment of error II is foredeigned. I believe the property here is exempt, but even if that position is wrong I believe the failure to remit the penalty if (sic) an abuse of discretion. The language in *Jennings & Churella Construction Co. v. Lindley* (1984), 10 Ohio St. 3d 67, allows the Board to remit any portion of the penalty. The appellant relied on the *Boltz* decision in good faith and attempted to comply with that decision. If *Boltz* was in error, as appellee claims, this does not excuse payment of the tax. Neither does it justify imposition of a penalty. The record is absolutely devoid of why a remission of the penalty was not granted. I would hold that even if assignment of error I were to be upheld, assignment of error II should be dismissed.⁴³

In this case, the Renaccis reasonably took the position that their ESBT income should not be taxed to them until the Ohio Supreme Court definitively ruled on the issue in 2007. The Renaccis' position was consistent with what the Tax Commissioner had accepted through 1999 and was also in accord with the IRS mandated regulations for trust tax years closing before December 29, 2000.⁴⁴

Although an electing small business trust ("ESBT") became a permissible shareholder of an S Corporation in 1996, the Tax Commissioner chose to only enforce his change in policy on taxation of ESBT income prospectively effective for the 2000 tax year.⁴⁵ By implication, this meant that the Tax Commissioner recognized that use of ESBTs as a tax strategy had been valid, reasonable and not in bad faith. Since no applicable change in federal or state income tax law had taken place at the time of the January 19, 2000 Information Release, the Tax Commissioner could have attempted to go back to tax years as far back as 1996 and collect personal income tax on

⁴³ *Kilbarger Construction, Inc. v. Limbach* (April 14, 1987), 4th Dist. C.A. No. 450, 1987 WL 9755, unreported at *3. (Opinion attached as Exhibit "2")

⁴⁴ Hearing Exhibit "3", Ohio Department of Taxation Information Release IT-2000-01 (January 19, 2000), p.1, ¶ 1.

⁴⁵ Hearing Transcript, p. 185:25-186:6. See also, Hearing Exhibit "3", Ohio Department of Taxation Information Release IT-2000-01 (January 19, 2000), p.1, ¶ 1.

ESBT income if he truly felt that he was only clarifying an already existing tax law. Instead, the Tax Commissioner arbitrarily only enforced his ESBT policy prospectively to taxable years beginning after December 31, 1999.⁴⁶ The Tax Commissioner also arbitrarily and inconsistently decided to charge the maximum double-interest penalty going forward for actions that he had previously acknowledged were valid.

A penalty must not be excessive to be upheld, but the Tax Commissioner assessed the maximum, double interest penalty even though the Renaccis acted in good faith and had timely and accurately filed their tax returns in prior years. Penalties “must be just” and “specifically related to the particular claim.” See e.g. *Insurance corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982), 456 U.S. 694, 707. In *Molchan v. Williams* (June 26, 2003), 8th Dist. C.A. No. 81653, 2003 WL 21469137, unreported,⁴⁷ a trial judge became incensed with one party’s “late” production of the insured’s written request for reduced coverage of \$500,000 and decided to let the insurance company “have it” by imposing the maximum possible penalty for excluding the document (a \$1,500,000 sanction). In reversing, the Court of Appeals - after finding the trial court had the right to impose a sanction - stated as follows:

We hold, however, that the court abused its discretion in imposing a potentially \$1,500,000 sanction (i.e., the difference between the \$2,000,000 and the \$500,000 coverage limits). Such a sanction is unwarranted and we find it to be unreasonable, arbitrary and unconscionable. (Citation omitted).⁴⁸

Likewise, the Tax Commissioner’s assessment of the maximum penalty -- more than \$290,000 -- is also excessive and arbitrary since it is not based upon any analysis of the Renaccis’

⁴⁶ Hearing Exhibit “3”, Ohio Department of Taxation Information Release IT-2000-01 (January 19, 2000), p.1, ¶ 1.

⁴⁷ *Molchan v. Williams* (June 26, 2003), 8th Dist. C.A. No. 81653, 2003 WL 21469137, unreported. (Opinion attached as Exhibit “3”)

⁴⁸ *Id.* at *2.

rationale for asserting their ESBT defense, or upon the specific circumstances of their case. The assessment of the maximum, double interest penalty is also excessive and arbitrary since it was not based upon any concern as to the Renaccis' collectability for the tax and interest portions of the assessment if they continued to exercise their appeal rights by waiting for the final definitive Supreme Court decision in *Lovell*.⁴⁹ The Renaccis were assessed an unconscionable penalty simply because they chose to pursue their appeal rights and not pay the full amount of tax and interest (approximately \$1.4 million) in less than two weeks as mandated by the Tax Commissioner because they could not do so. This is particularly egregious and a totally inappropriate use of the penalty provision since no tax concession was allowed and relevant Supreme Court cases were pending. The Tax Commissioner dangled penalty relief in exchange for a complete capitulation on the merits of the tax liability even though penalty provisions were not intended to be used in this manner as a tool to suppress appeals.

Finally, the Tax Commissioner was also fully apprised of the ESBT income from the three timely filed Form FT 1120S notices. Despite the Tax Commissioner's stated policy in his 2002 Release that "[t]he Department will 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,"⁵⁰ the Tax Commissioner did not assess fraud penalties on the Renaccis.⁵¹ If the Renaccis had not fully disclosed ESBT income, the Tax Commissioner would have assessed fraud penalties upon them pursuant to the 2002 Release. It is therefore clear that the Renaccis were not hiding the

⁴⁹ Hearing Transcript at 88:19-22.

⁵⁰ Ohio Department of Taxation Information Release PIT 2002-04 (July 3, 2002) at p. 1, ¶ 2, attached to Hearing Exhibit "5", March 25, 2003 Ohio Department of Taxation letter of assessment.

⁵¹ Hearing Transcript at 65:14-19 (Margaret Brewer testified that a fraud penalty was not assessed upon the Renaccis).

existence of, nor the amount of, ESBT income, and the Tax Commissioner recognized that fact. Under these circumstances, the Renaccis acted with reasonable cause and without willful neglect pursuant to R.C. 5747.15(C), and the Tax Commissioner clearly abused his discretion by imposing any penalty, let alone the maximum penalty.

C. THE TAX COMMISSIONER'S CONDITIONING PENALTY ABATEMENT UPON RECEIVING PAYMENT AND WAIVER OF APPEAL RIGHTS WAS AN ABUSE OF DISCRETION AND A TAKING WITHOUT THE RIGHT TO DUE PROCESS OF LAW.

Under R.C. 5747.13(E) and (F), Ohio taxpayers have the right to appeal tax decisions without having yet paid the tax assessed. As provided in the pertinent part of R.C. 5747.13, "Notwithstanding the fact that a petition for reassessment is pending, the petitioner may pay all or a portion of the assessment that is the subject of the petition."⁵² In the present case, the Tax Commissioner's decision to waive a portion of the penalty only for those taxpayers who paid tax and interest in full on the ESBT income and waived their appeal rights, was an abuse of discretion, as it was unreasonable and arbitrary. Such a distinction effectively punished the Renaccis and other taxpayers for exercising their due process rights. The Tax Commissioner's conditioning penalty abatement on the Renaccis relinquishing their appeal rights, especially when no tax concession was allowed and relevant Supreme Court decisions were pending, was an arbitrary and totally inappropriate use of the penalty provision.

In enforcing the new policy set forth in the 2000 Release, the Tax Commissioner arbitrarily took the position that penalties would only be abated if taxpayers paid taxes on ESBT income prior

⁵² R.C. 5747.13(F).

to assessment,⁵³ or paid such tax after assessment but waived appeal rights.⁵⁴ Margaret Brewer, Administrator of Appeals Management for the Ohio Department of Taxation testified:

In eleven instances in which assessed taxpayers using the grantor-trust/ESBT device appealed from the BTA's decisions affirming the Commissioner's final determinations, but prior to the Ohio Supreme Court's subsequent issuance of its decision in *Lowell v. Levin*, 116 Ohio St.3d 200, 2007-Ohio-6054, the Commissioner, in the exercise of his discretion to resolve controversies by settlement, offered to resolve the litigation by reducing the double-interest penalty, **provided that such taxpayers dismissed their appeals and promptly paid the assessed tax, interest and modified penalty, thereby rendering the matters finally and conclusively resolved.**⁵⁵

Arbitrarily requiring taxpayers such as the Renaccis to either relinquish their property before pursuing an appeal or to waive their appeal rights constitutes an abuse of discretion and improper taking.

The Tax Commissioner also abused his discretion by maintaining the penalty simply because the Renaccis' 2000 Return reported a position the Renaccis supposedly knew was contrary to the Tax Commissioner's prospective policy change (even though the policy was the subject of multiple challenges that needed to be resolved by multiple Ohio Supreme Court decisions).⁵⁶ However, other taxpayers who took the identical position as the Renaccis had their penalty abated when they paid the tax, interest and penalty demanded by the Tax Commissioner.⁵⁷ In fact, the Tax Commissioner admits that the Renaccis' case is essentially

⁵³ Ohio Department of Taxation Information Release PIT 2002-04 (July 3, 2002) at p. 1, ¶ 3, attached to Hearing Exhibit "5", March 25, 2003 Ohio Department of Taxation letter of assessment.

⁵⁴ Hearing Exhibit "D", Affidavit of Margaret Brewer at ¶ 6.

⁵⁵ *Id.*

⁵⁶ Hearing Exhibit "1", Ohio Department of Taxation Final Determination of April 26, 2012, p.1, ¶ 2.

⁵⁷ Hearing Exhibit "D", Affidavit of Margaret Brewer at ¶ 6.

identical to other cases where the penalty was abated, except those taxpayers paid earlier – but still years after the tax was due – and waived their right to appeal.⁵⁸

The BTA has determined that it is an abuse of discretion where the Tax Commissioner chooses to waive penalties in some, but not all, identical situations. *Hill v. Tracy*, BTA Case No. 99-K-145 (July 30, 1999). In abating the penalty for the other taxpayers, and offering to waive the penalty for the Renaccis if they could have paid \$1.4M in less than two weeks, the Tax Commissioner has acknowledged the filing position taken by these taxpayers – that the grantor of an ESBT was not subject to Ohio income tax on income of the ESBT – constituted reasonable cause, and not willful neglect. Presumably, the Tax Commissioner concluded so in the other cases, and was willing to do so for the Renaccis because: (1) this position was accepted in previous years; (2) no change in the law occurred (only in the Department's policy); (3) there was a good faith belief amongst many practitioners, including Tax Commissioner Zaino when he practiced outside the Department of Taxation, and his Special Counsel, Sherman, that such a position was valid; and (4) multiple appeals concerning this issue were being heard by the Ohio Supreme Court, which ultimately agreed with the Tax Commissioner in a split decision. These factors also undoubtedly played a role in the Tax Commissioner's decision to only enforce his newly announced ESBT policy prospectively, yet he abused his discretion in harshly charging the maximum double-interest penalty under the same circumstances.

The Tax Commissioner has previously determined that asserting a disputed position during the pendency of an appeal constituted reasonable cause and waived penalties for periods prior to the final determination of the issue. See *NLO, Inc. v. Limbach*, BTA Case Nos. 88-K-1115 and 88-K-1116 (June 30, 1992) (Tax Commissioner waived penalties for periods prior to

⁵⁸ *Id.* at ¶¶ 6-7.

the U.S. Supreme Court's determination of identical issue). The only reason the Renaccis' penalty was not abated was due to the timing of their payments – a fact unrelated to their filing position or the reasonableness thereof.⁵⁹ The Tax Commissioner's decision to condition penalty abatement upon immediate payment and waiving appeal rights is arbitrary, unreasonable and unconscionable. Furthermore, the Tax Commissioner was biased against the Renaccis as they were afforded less than two (2) weeks to make the required payment, when other taxpayers were offered a longer period.⁶⁰ The timing of a late payment cannot be a legitimate basis for determining whether or not to impose the maximum payment, as the Tax Commissioner did in this case.

D. THE BTA ERRED AND ABUSED ITS DISCRETION BY NOT PERMITTING PRE-HEARING DEPOSITIONS OF FORMER AND CURRENT OHIO DEPARTMENT OF TAXATION PERSONNEL.

During the course of the BTA proceeding, the BTA limited the Renaccis' ability to develop and present their case by not allowing 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. The Renaccis subpoenaed each of these individuals for pre-hearing depositions through valid subpoenas approved by the BTA and noticed the time and place of these depositions. Nevertheless, the Tax Commissioner's counsel refused to produce the witnesses for depositions and the BTA denied the Renaccis' motion to enforce those subpoenas. The purpose of these pre-hearing depositions was to determine the likely hearing testimony of Zaino, Bessey, Sherman, and Brewer about the Tax Commissioner's prior policies concerning whether income earned by ESBT's was taxable and to

⁵⁹ Hearing Exhibit "1", Ohio Department of Taxation Final Determination of April 26, 2012, p.2, ¶ 1.

⁶⁰ *Id.* at ¶¶ 8-9.

determine whether the Tax Commissioner had previously assessed income tax on income earned by ESBT's for tax years ending prior to December 29, 2000. Zaino's deposition testimony was also sought to question him about his understanding of ESBT tax policies while he was a private practitioner cited in newspaper articles before he was Tax Commissioner.⁶¹ Accordingly, no alleged basis for attorney-client privilege or deliberative process privilege asserted by the Tax Commissioner's counsel would have been applicable to such testimony.

The Tax Commissioner filed a Joint Motion to Quash the deposition subpoenas of Zaino, Bessey, Sherman and Brewer on February 27, 2014, and the Renaccis filed an Objection to the Joint Motion to Quash on March 3, 2014. The BTA did not rule on the Joint Motion to Quash until the Hearing. At the Hearing, the Renaccis raised the Tax Commissioner's failure to produce witnesses at the scheduled depositions at the Hearing and sought to compel the depositions, but their request was denied by the Hearing Examiner. By not permitting these depositions, the BTA prejudiced the Renaccis' ability to anticipate and fully prepare for the testimony of these potential witnesses and to discover evidence of any prior enforcement of income tax on income earned by ESBT's for tax years ending before December 29, 2000.

E. THE BTA ERRED AND ABUSED ITS DISCRETION BY NOT PERMITTING HEARING TESTIMONY OF FORMER AND CURRENT OHIO DEPARTMENT OF TAXATION PERSONNEL ABOUT POLICIES OF THE TAX COMMISSIONER AND DEPARTMENT OF TAXATION CONCERNING WHETHER INCOME EARNED BY AN 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.

The Renaccis were also prejudiced by the BTA hearing examiner's limitation of the scope of their questioning of Witnesses Sherman, Zaino and Brewer. Sherman and Zaino had been

⁶¹ Hearing Transcript, p. 162:14-163:2.

subpoenaed to appear at the Hearing by the Renaccis for the purpose of obtaining their testimony concerning the change in the Tax Commissioner's policies concerning ESBT income, as well how those policies were enforced prior to and after the issuance of the 2000 Release. Such testimony was materially relevant to the issues of whether or not the Tax Commissioner abused his discretion in refusing to abate the penalty imposed upon the Renaccis and whether the Renaccis' position constituted reasonable cause, since it was based, in part, upon the Tax Commissioner's pre-2000 policies. Zaino's hearing testimony was also sought to question him about his understanding of ESBT tax policies while he was a private practitioner cited in newspaper articles before he was Tax Commissioner.⁶²

Prior to the Hearing, the Tax Commissioner filed a Motion to Quash the subpoenas *duces tecum* which had been served upon Sherman and Zaino for Hearing testimony. The BTA denied the Tax Commissioner's Motion to Quash prior to the Hearing. Nevertheless, the hearing examiner limited the scope of questions that the Tax Commissioner's counsel was permitted to ask of Sherman and Zaino concerning changes in Ohio Department of Taxation policies with respect to ESBT income and the enforcement thereof. Such limitations were prejudicial to the Renaccis since the testimony of Zaino and Sherman was relevant concerning changes in Tax Commissioner policy concerning ESBTs and the imposition and abatement of penalties imposed upon the Renaccis and other taxpayers in an identical position.

Throughout the Hearing, the Tax Commissioner's counsel objected to questions asked of Sherman and Zaino based upon attorney-client privilege, deliberative process privilege, or a qualified privilege for confidential tax information. Such objections were primarily sustained. However, Ohio tribunals have not adopted a general "deliberative process" exception for

⁶² Hearing Transcript, p. 162:14-163:2.

administrative agencies. See, *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St.3d 168, 172 (“the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.”); *State ex rel. Dist. 1199 v. Gulyassy* (1995), 107 Ohio App.3d 729. The BTA has also considered, and refused to apply, the deliberative process privilege in cases involving appeals from final determinations of the Commissioner. See, *The Pullman Co. v. Limbach* (Interim Order, May 17, 1991), BTA No. 1990-D-427 (refusing to apply the privilege); *Prince v. Zaino* (Interim Order, February 11, 2005) Case No. 2003-T-514 (finding without merit the same blanket privilege asserted on behalf of the Tax Commissioner in another case).

Even if the deliberative process privilege was applicable, which it is not, the Tax Commissioner must demonstrate that the information sought is: (1) deliberative; and (2) predecisional, before the privilege even applies.⁶³ The Renaccis did not request records or confidential information from Zaino and Sherman, only Hearing testimony concerning the public change in Tax Commissioner policy concerning grantor ESBTs, how such policy change was administered after it was enacted, and the imposition or abatement of penalties concerning such trusts upon taxpayers, including the Renaccis. Additionally, any questions posed to Zaino about his understanding of ESBT tax policy as a private practitioner, either before or after his service as Tax Commissioner, could not have been subject to attorney-client privilege or deliberative process privilege asserted by the Attorney General, as counsel for the office of Tax Commissioner.

F. THE TAX COMMISSIONER’S ASSIGNMENTS OF ERROR ALLEGING THAT THE BTA WAS WITHOUT JURISDICTION TO HEAR THE RENACCIS’ APPEAL ARE WITHOUT MERIT.

⁶³ *NLRB v. Sears, Roebuck & Co.* 421 U.S. 132, 151 (1975).

The Tax Commissioner's Assignments of Error wrongly allege that the Renaccis did not have the right to appeal the Tax Commissioner's 2012 Final Determination which denied their refund claim on the penalty and related interest. These purported procedural issues are without merit and directly contradict prior positions taken by the Tax Commissioner. In the 2012 Final Determination in this case, the Tax Commissioner addressed the merits of the Renaccis' refund claim for penalty abatement and related interest and denied the refund claim, but did not address or raise any alleged procedural errors with the Renaccis' refund claim. The Tax Commissioner recognized, without comment or disapproval, that the Renaccis had previously filed a petition for reassessment of the entire assessed tax, interest, and penalties, which resulted in a Final Determination from the Tax Commissioner on June 15, 2006.⁶⁴ The Tax Commissioner then summarized, without any finding of procedural defect, that "The claimants paid the assessment in full, and subsequently filed a refund claim for the affirmed portions of interest and penalty. The claimants contend that the Tax Commissioner should have abated the assessed interest and penalty in the Final Determination."⁶⁵

The Tax Commissioner's decision to review the Renaccis' May 8, 2009 Application for Personal Income Tax Refund on the merits was consistent with his and his counsel's representations to, and agreements with, the Renaccis' counsel in handling the appeal of his earlier 2006 Final Determination. In email correspondence in 2008, the Tax Commissioner's counsel, Mr. Hubbard, and Margaret Brewer, Administrator of Appeals Management for the Ohio Department of Taxation, both agreed to the Renaccis dismissing their prior appeal, paying the tax, interest and penalties, and then seeking penalty abatement through a refund claim.

⁶⁴ Hearing Exhibit "1", Ohio Department of Taxation Final Determination of April 26, 2012, p.1, ¶ 2.

⁶⁵ *Id.*

In email correspondence from February 14, 2008 through March 10, 2008, admitted into evidence as Hearing Exhibit "13" at the Hearing, the Tax Commissioner's counsel, Mr. Hubbard, represented:

The jurisdictional question is whether the Renaccis would be barred from filing an income tax refund claim seeking penalty remission, given their previous filing of a petition for reassessment challenging the tax increase and seeking penalty relief, and given that the Commissioner issued a final determination that denied that requested relief, which was then followed by an appeal of the final determination to the BTA (which did not specify any penalty abatement issue) and then to the Court of Appeals. To my knowledge, this issue has never been presented before.⁶⁶

Contrary to the jurisdictional arguments he is now contending, Mr. Hubbard then went on to agree that:

For purposes of the Renaccis' situation, Marge Brewer has informed me that if the Renaccis file a refund claim limited to seeking penalty remission, the Commissioner would not dismiss the refund claim on the basis of res judicata or collateral estoppel, despite the Renaccis' having previously requested penalty remission pursuant to their petition for reassessment.⁶⁷

Margaret Brewer, Administrator of Appeals Management for the Ohio Department of Taxation, also agreed to the Renaccis dismissing their prior appeal, paying the tax, interest and penalties, and then seeking penalty abatement through a refund claim. On March 7, 2008, Counsel for the Renaccis wrote to Ms. Brewer and Mr. Hubbard, asking:

Consistent with what you set forth below, I assume the Tax Commissioner would issue a Final Determination on the refund claim which can then be appealed to the Board of Tax Appeals and, thereafter, the courts for consideration of the merits as to whether failure to abate all of the penalty was appropriate assuming all or a portion of the penalty remains in the Tax Commissioner's Final Determination."⁶⁸

⁶⁶ March 7, 2008 email from Bart Hubbard to Appellants' counsel at ¶ 4, included in Hearing Exhibit "13".

⁶⁷ *Id.* at ¶ 5.

⁶⁸ March 7, 2008 email from Steve Dimengo to Bart Hubbard and Margaret Brewer at ¶ 1, included in Hearing Exhibit "13".

In response, Ms. Brewer agreed, “I believe the assumption contained in your March 7, 2008 email is correct.”⁶⁹ At the Hearing, Ms. Brewer also admitted to the Renaccis’ ability to pursue a penalty refund if they dismissed their prior appeal and then paid the tax, interest and penalty:

Q: But you stated in your response on March 10, 2008 that you believed that the Renaccis could appeal that final determination?

A: I stated that I believe that – that there was an assumption you can file an appeal of a final determination.⁷⁰

In reliance upon both the representations and agreements with Ms. Brewer and Mr. Hubbard, the Renaccis paid the tax, interest and penalty and dismissed their appeal of the 2006 Final Determination to pursue a refund claim on the penalty and related interest.

Even aside from the agreement reached between the parties clearly preserving the Renaccis’ ability to contest the penalty, the Renaccis’ right to appeal is also supported by *Crown Communication, Inc. v. Testa* (2013), 136 Ohio St.3d 209, ¶ 31, in which the Ohio Supreme Court held that taxpayers are justified in relying upon the Tax Commissioner’s instructions in appealing a tax assessment.⁷¹ The Ohio Supreme Court held that “...by including instructions for filing a petition for reassessment with an assessment that identified itself as ‘final,’ the commissioner conferred on Crown the option to follow the instructions and thereby treat the assessment as preliminary rather than final for appeal purposes.”⁷² The Court also determined that “There is no reason – and certainly nothing in the statutes – that compels us to make the taxpayer suffer adverse

⁶⁹ March 10, 2008 email from Margaret Brewer to Steve Dimengo at ¶ 1, included in Hearing Exhibit “13”.

⁷⁰ March 3, 2013 Hearing Transcript (“Hearing Transcript”) at p. 130:13-18.

⁷¹ *Crown Communication, Inc. v. Testa* (2013), 136 Ohio St.3d 209, ¶ 31.

⁷² *Id.*

consequences because of the commissioner's own statutory transgressions."⁷³ Accordingly, the Court ruled that "...the BTA erred by determining that Crown had committed a fatal procedural error when it followed the appeal instructions furnished by the tax commissioner."⁷⁴

In the present case, the Renaccis did not commit a procedural error in filing a refund claim for the penalty and related interest paid on the assessed tax pertaining to the ESBT income. The Renaccis' refund request was predicated upon the Tax Commissioner's agreement and representations made in consideration for, and to induce, the Renaccis to pay the tax, interest and penalty and to dismiss their appeal of the 2006 Final Determination. The Renaccis' first appeal was not litigated on the merits, but was dismissed voluntarily.

Moreover, there is clear statutory and case authority for the Renaccis' right to pursue an appeal of the Tax Commissioner's denial of their penalty refund claim and for the BTA's jurisdiction over that appeal.

R.C. 5747.11(A)(3) provides, in pertinent part, that:

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:.....

(3) Amounts in excess of one dollar paid on an illegal, erroneous, or excessive assessment.⁷⁵

Accordingly, refund claims are not limited by statute to tax, or even interest, but are applicable to any amounts paid on an illegal, erroneous, or excessive assessment.⁷⁶ Refund claims must be filed within four (4) years from the date of the payment.⁷⁷ Here, the Renaccis paid the full tax and

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 41.

⁷⁵ R.C. 5747.11(A)(3)

⁷⁶ *Id.*

⁷⁷ R.C. 5747.11(B)

interest assessed on income generated from the Trust for the tax year 2000 by making payments of \$140,000 in April 2007, \$814,650 in August 2007, and \$425,400 in December 2007.⁷⁸ In October 2008, the Renaccis paid the full double-interest penalty, including additional accrued interest, in the amount of \$359,822.⁷⁹ The Renaccis then filed a refund claim on the penalty payment in May 2009, which was denied by the Tax Commissioner in his 2012 Final Determination that is currently the subject of this appeal. Accordingly, the Renaccis properly filed a refund claim well within the four (4) year statute of limitations.

Independently, the BTA has jurisdiction to hear appeals of issues expressly raised before the Tax Commissioner and also those addressed in his Final Determinations.⁸⁰ In *Mt. Sinai v. Wilkins* (February 2, 2010), BTA No. 2006-M-2129, 2010 WL 415427, unreported, the BTA held that where the Tax Commissioner makes a decision on the merits of a taxpayer's case and does not dismiss the application for lack of jurisdiction, the BTA limits its review to the statute considered by the Tax Commissioner, rather than to any alleged jurisdictional questions.⁸¹ As the BTA explained:

In the present case, however, the Tax Commissioner did not conclude that he was without jurisdiction to consider the matter. Instead, the Tax Commissioner considered exemption under R.C. 5709.12. Under the same circumstances in prior cases, this board limited our review to the statute considered by the Tax Commissioner. *Oikos Community Dev. Corp. v. Zaino* (November 9, 2001), BTA No. 2000-T-2037, unreported. We take the same action today.⁸²

Similarly, in *Grace Chapel v. Levin* (May 4, 2010), BTA No. 2007-K-835, 2010 WL 1832532, unreported, the BTA concluded that even where an application for a tax exemption does

⁷⁸ Renacci Affidavit at ¶ 9.

⁷⁹ Renacci Affidavit at ¶ 10.

⁸⁰ *Mt. Sinai v. Wilkins* (February 2, 2010), BTA No. 2006-M-2129, 2010 WL 415427, unreported, *3.

⁸¹ *Id.*

⁸² *Id.*

not specifically state under which section of the Ohio Revised Code an exemption is being sought, the BTA will review the Tax Commissioner's ruling where the Tax Commissioner did not conclude in his Final Determination that he was without jurisdiction to consider the matter.⁸³ Under the holdings of both *Mt. Sinai* and *Grace Chapel*, since the Tax Commissioner treated the refund claim as a request for penalty abatement / remission and the BTA must properly afforded the Renaccis' appeal the same treatment.

Additionally, under R.C. 5703.60(A)(3), if a final determination is issued on a petition for reassessment that either cancels, affirms, or increases the assessment, the final determination is subject to appeal under R.C. 5717.02.⁸⁴ R.C. 5703.60(A)(3) goes on to provide that "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."⁸⁵ The BTA properly found that "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."⁸⁶ Here, the Renaccis' objections to the Tax Commissioner's assessment and Final Determination were not decided by the BTA in considering the Renaccis' 2003 Petition for Reassessment. In March 2008, the Renaccis dismissed their 2003 Appeal of the Tax Commissioner's Final Determination, without the BTA rendering a decision, on the condition that the Tax Commissioner agree to address penalty abatement in a separate appeal via a refund claim

⁸³ *Grace Chapel v. Levin* (May 4, 2010), BTA No. 2007-K-835, 2010 WL 1832532, unreported, *5.

⁸⁴ BTA Decision at p. 3, ¶ 4, citing R.C. 5703.60(A)(3).

⁸⁵ R.C. 5703.60(A)(3).

⁸⁶ BTA Decision at p. 3, ¶ 5.

after the penalty was paid in full.⁸⁷ Since the BTA did not issue an opinion in the 2003 Appeal concerning the issues raised in the Renaccis' request for penalty abatement, the BTA correctly found that, under R.C. 5703.60(A)(3), the BTA had jurisdiction to consider the Renaccis' objections to the penalties as raised through their application for refund.⁸⁸

There is therefore clear statutory and case authority for the Renaccis' right to pursue an appeal of the Tax Commissioner's denial of their penalty refund claim and for the BTA's jurisdiction over that appeal. Refund claims are not limited by statute to tax, or even interest, but are applicable to any amounts paid on an illegal, erroneous, or excessive assessment. (R.C. 5747.11(B)). The Renaccis paid the full tax and interest assessed on income generated from the Renacci Trust for the tax year 2000 by making payments of \$140,000 in April 2007, \$814,650 in August 2007, and \$425,400 in December 2007. In October 2008, the Renaccis paid the full double-interest penalty, including additional accrued interest, in the amount of \$359,822. These payments totaled \$1,739,872. The Renaccis then filed a refund claim on the penalty payment in May 2009, which was denied by the Tax Commissioner in his 2012 Final Determination that is the subject of the present appeal. The Tax Commissioner's arguments against the BTA's jurisdiction to hear the Renaccis' appeal are all without merit and were properly rejected in the BTA Decision.

III. CONCLUSION

The Renaccis acted with reasonable cause and not willful neglect in filing their 2000 Tax Return based upon a position publicly accepted by the Tax Commissioner for previous years. The Tax Commissioner abused his discretion by imposing a double-interest penalty upon the Renaccis

⁸⁷ Hearing Exhibit "13", March 10, 2008 email exchange between Appellee's Executive Administrator of Appeals Management, Margaret Brewer and Appellants' counsel, Steve Dimengo.

⁸⁸ BTA Decision at p. 3, ¶ 5.

for following the Tax Commissioner's own long-standing policy, while fully disclosing such income. The Tax Commissioner's policy change applied prospectively, not premised upon any change in law, was the subject of many legitimate appeals, two of which were determined by the Ohio Supreme Court. The Tax Commissioner further abused his discretion by making any penalty abatement contingent upon the Renaccis paying the tax and interest and relinquishing their appeal rights, which was a violation of due process.

The BTA erred in upholding the Tax Commissioner's decision and also in not allowing the deposition and hearing testimony of the former Tax Commissioner and his representatives about the policy at issue in this case. The BTA's decision should, therefore, be overturned and the penalty assessed to the Renaccis should be abated and refunded in full in the amount of \$359,822 (and accompanying interest).

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC

By: /s/ Matthew R. Duncan
Steven A. Dimengo (#0037194)
Matthew R. Duncan (#0076420)
3800 Embassy Parkway, Suite 300
Akron, OH 44333
(330) 376-5300 (Telephone)
(330) 258-6559 (Facsimile)
sdimengo@bdblaw.com
mduncan@bdblaw.com
*Attorneys for Appellants, James B. & Tina D.
Renacci*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of Appellants was served by electronic mail to barton.hubbard@ohioattorneygeneral.gov on the 28th day of January 2015 and by Ordinary U.S. Mail, postage prepaid, on the 28th day of January 2015 upon Barton Hubbard, Assistant Attorney General, Attorney General of Ohio (Taxation Section), 30 E. Broad Street, 25th Floor Columbus, OH 43215

/s/ Matthew R. Duncan

AK3:1187149_v5

APPENDIX

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.)	

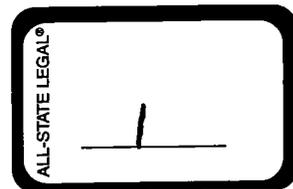
NOTICE OF APPEAL OF APPELLANTS JAMES B. & TINA D. RENACCI

Steven A. Dimengo #0037194 (Counsel of record)
Matthew R. Duncan #0076420
BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC
3800 Embassy Parkway, Suite 300
Akron, Ohio 44333
Phone: (330) 376-5300
Fax: (330) 258-6559

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

Mike DeWine, Attorney General of Ohio
Barton Hubbard, Assistant Attorney General
(Counsel of Record)
State Office Tower
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

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,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC



Steven A. Dimengo #0037194 (Counsel of record)
Matthew R. Duncan #0076420
3800 Embassy Parkway, Suite 300
Akron, Ohio 44333
Phone: (330) 376-5300
Fax: (330) 258-6559
Counsel for Appellants,
James B. & Tina D. Renacci

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by **certified** mail, postage prepaid and through the electronic filing system of the Board of Tax Appeals this 31st day of October, 2014 to:

Barton Hubbard, Assistant Attorney General
(Counsel of Record)
State Office Tower
30 East Broad Street, 25th Floor
Columbus, Ohio 43215



Steven A. Dimengo #0037194
Counsel for Appellants,
James B. and Tina D. Renacci

CERTIFICATE OF FILING

The Appellants, James B. and Tina D. Renacci hereby certify to the Ohio Supreme Court that they filed their Notice of Appeal with the Board of Tax Appeals on the 31st day of October, 2014. A copy of the Notice of Appeal filed with the Board of Tax Appeals is attached hereto.



Steven A. Dimengo #0037194
Counsel for Appellants,
James B. and Tina D. Renacci

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
Represented by:
STEVEN A. DIMENGO
BUCKINGHAM, DOOLITTLE & BURROUGHS,
LLC
3800 EMBASSY PARKWAY, SUITE 300
AKRON, OH 44333

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF
OHIO
Represented by:
BARTON A. HUBBARD
ASSISTANT ATTORNEY GENERAL
OFFICE OF OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FL
COLUMBUS, OH 43215

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:

"(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	<i>[Handwritten Signature]</i>	
Mr. Johrendt	<i>[Handwritten Signature]</i>	
Mr. Harbarger	<i>[Handwritten Signature]</i>	

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.

[Handwritten Signature]

A.J. Groeber, Board Secretary

Filters | [How do I use This Page? - Quick Tour | Video](#) | Appeal Year: 2012 | Appeal Number: 1850 | Case Name: JAMES B. & TINA D. RENACCI VS. JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

Party Details

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

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

Phase: Award

Stage: Decision

Acto r: STEVEN A.

Filing Date: 26-Jun-2012

Appealed Decision Type: Ohio Tax Commissioner

Roles: DocketingEfile ClerkDecisionOrder

Reset

Timeline View | **Case Details** | **Tasks** | **Actions**

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	AppellantBriief	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		

OHIO BOARD OF TAX APPEALS

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

APPEARANCES:

For the Appellant(s)

- JAMES B. & TINA D. RENACCI
 Represented by:
 STEVEN A. DIMENGO
 BUCKINGHAM, DOOLITTLE & BURROUGHS,
 LLC
 3800 EMBASSY PARKWAY, SUITE 300
 AKRON, OH 44333

For the Appellee(s)

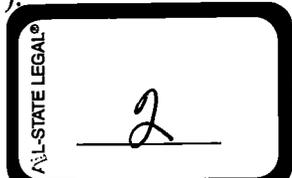
- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
 Represented by:
 BARTON A. HUBBARD
 ASSISTANT ATTORNEY GENERAL
 OFFICE OF OHIO ATTORNEY GENERAL
 30 EAST BROAD STREET, 25TH FL
 COLUMBUS, OH 43215

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) ("*Renacci I*").



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:

"(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.

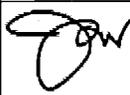
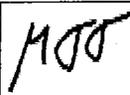
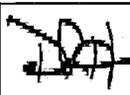
Appellants primarily cite three decisions in support of their arguments. First, they cite *Frankelite Company v. Lindley* (1986), 28 Ohio St.3d 29, where the court found an abuse of discretion where a taxpayer had made honest and sincere attempts to comply with its sales tax obligations. Second, they 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