

IN THE SUPREME COURT OF OHIO

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

**THIRD MERIT BRIEF OF APPELLANTS/CROSS-APPELLEES
JAMES B. AND TINA D. RENACCI**

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I. STATEMENT OF THE CASE

There are no factual issues in this matter, and both sides recognize the significant burden of proving a tax commissioner's abuse of discretion in deciding not to abate an income tax penalty. However, under the very unique circumstances of this case, the actions of Appellee/Cross-Appellant, Joseph W. Testa, Tax Commissioner ("Tax Commissioner") do constitute an abuse of discretion.

The central issue is whether a taxpayer should be penalized even though he voluntarily disclosed his position in following a longstanding tax planning practice publicly declared acceptable by the Tax Commissioner and his representatives, which is then prospectively changed by the Tax Commissioner without any corresponding change in the law. Appellants/Cross-Appellees, James B. and Tina D. Renacci (the "Renaccis") did not hide the income earned by the James B. Renacci Trust – 1998 (the "Renacci Trust") and fully disclosed and reported the income on three (3) separate FT-1120-S Notices of S Corporation Status ("Notices of S Corporation Status") timely filed with the Ohio Department of Taxation for the tax year at issue.

By reporting the income in the Notices of S Corporation Status, but not on their 2000 personal income tax return, the Renaccis asserted an undisputedly reasonable position (i.e., that the income of a grantor trust making an electing small business trust ("ESBT") election was not subject to Ohio income tax). The Renaccis' disclosure was unnecessary due to the reasonableness of their position. Aside from the penalty at issue in this appeal, had the very same facts occurred in the prior tax year which was governed by the same law, the Tax Commissioner even agrees there would not even be a tax liability on the income at issue. Despite these unique circumstances, the

Tax Commissioner arbitrarily penalized the Renaccis unless they agreed to pay tax and interest in a very short period of time and either filed a pre-assessment refund claim or relinquished their rights to appeal post-assessment. The Tax Commissioner did not abate the penalty imposed on the Renaccis simply because they could not pay the taxes, interest and penalty totaling more than \$1.4 million in less than two (2) weeks, while other taxpayers were given more time to pay (some of which even retained full appeal rights). Aside from this being an arbitrary basis for the Tax Commissioner to penalize the Renaccis, the Tax Commissioner's decision to abate a portion of the penalty only for those taxpayers who fully paid the tax and interest on the ESBT income and who waived their appeal rights constitutes a taking of property without Due Process of law. This is also a totally inappropriate use of penalty provisions, which are not intended to be used as a club by the Tax Commissioner to coerce waiver of Due Process rights by otherwise requiring the taxpayer to prove an abuse of discretion. The Ohio income tax code's penalty provisions were simply not intended to be used as leverage to impede appeals.

The Board of Tax Appeals ("BTA") has incorrectly ruled that the Tax Commissioner did not abuse his discretion simply because the Renaccis did not follow the Tax Commissioner's new untested prospective policy, when the totality of the circumstances should have been considered. The Tax Commissioner has argued in his Second Merit Brief that: (1) the Renaccis did not have reasonable cause to exclude income earned by the Renacci Trust in their 2000 personal income tax return; (2) the Tax Commissioner's imposition of a double-interest penalty on the Renaccis and his refusal to abate it was not unreasonable, arbitrary or unconscionable; and (3) Ohio taxpayers do not have the right to seek refunds of income tax penalties. These

arguments are wholly refuted by Ohio law and the undisputed facts in this case, which are more fully set forth in the Renaccis' First Merit Brief.

Both sides agree that the Renaccis filed their 2000 Income Tax Return based upon the long-standing position historically accepted by the Tax Commissioner that the income of a grantor trust making an ESBT election was not subject to Ohio income tax. Also undisputed is that the Tax Commissioner prospectively changed his position on the taxation of such income (meaning prior year taxpayers were allowed to exclude such income), and this new position was not the result of any change in law. Additionally, it is not contested that the Renaccis voluntarily fully disclosed and reported the income earned by the Renacci Trust on three (3) separate Notices of S Corporation Status timely filed with the Tax Commissioner.¹ Under all of these conditions, the Renaccis did, in fact, have reasonable cause to exclude the income earned by the Renacci Trust in their 2000 personal income tax return.

The Tax Commissioner has also not disputed that he imposed a double-interest penalty upon the Renaccis and conditioned penalty abatement upon the Renaccis making full payment of more than \$1.4 million in tax, interest and proposed reduced penalty within two (2) weeks, and only if the Renaccis relinquished their appeal rights. Nor has the Tax Commissioner disputed that other taxpayers who paid the tax before they were assessed (even during the course of an audit) were not penalized and retained full refund rights. The Tax Commissioner also admittedly had no concern about the Renaccis' collectability for the assessed tax and interest if the Renaccis' pursued their appeal rights,² yet still requiring an immediate payment for partial penalty abatement.

¹ Although the Tax Commissioner disputes that the filing of these Notices of S Corporation Status equated to the filing of a tax return, he does not dispute the accuracy of the contents of the Notices of S Corporation Status and the amounts of income reported therein.

² Hearing Transcript at 88:19-22.

The Tax Commissioner's imposition of a double-interest penalty on the Renaccis and his refusal to abate it was unreasonable, arbitrary, and unconscionable under the circumstances.

The BTA properly held in its October 1, 2014 Decision and Order in this matter (the "BTA Decision") that Ohio taxpayers do have the right to seek refunds of income tax penalties pursuant to R.C. 5703.60(A)(3) and R.C. 5717.02 where, as is this case, a decision on the merits concerning penalty abatement has not been rendered by the BTA or a court. Moreover, taxpayers may pursue penalty abatement through a refund claim under R.C. 5747.11 on an erroneous or excessive assessment like the one involved here. The Tax Commissioner's jurisdictional argument concerning tax penalty refunds is accordingly wholly without merit, and the jurisdictional portion of the BTA Decision should be upheld, while the BTA's finding that that the Tax Commissioner did not abuse his discretion in denying the Renaccis' refund claim should be reversed.

II. LAW AND ARGUMENT

A. **PROPOSITION OF LAW NO. I: A TAXPAYER ACTS WITH REASONABLE CAUSE AND WITHOUT WILLFUL NEGLIGENCE IN FOLLOWING A LONGSTANDING TAX POLICY OF THE OHIO DEPARTMENT OF TAXATION AND IN FULLY DISCLOSING THEIR POSITION.**

The Renaccis had Reasonable Cause to Exclude ESBT Income from Their Personal Income Tax Returns and Acted in Good Faith, Meeting the Requirements to Abate a Tax Penalty.

The Tax Commissioner wrongly contends that the prerequisite of finding a taxpayer's "reasonable cause" and "good faith" is unrelated to whether the Tax Commissioner abuses his or her discretion in denying a request for penalty abatement. Under R.C. 5747.15(C), which governs the imposition of penalties for failure to pay income taxes, 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.”³ The Tax Commissioner misleadingly cites *J.M. Smucker, L.L.C. v. Levin* (2007), 113 Ohio St.3d 337, which interprets the penalty provisions of R.C. 5711.28 for non-reporting of taxable personal property, to argue that the BTA and a reviewing court do not have authority to consider whether a taxpayer acted with reasonable cause and not willful neglect in determining whether the Tax Commissioner abused his discretion in not abating a penalty. Although this Court found in *Smucker* that “The existence of reasonable cause [by the taxpayer] would merely trigger the Tax Commissioner’s discretion to grant or deny an abatement,”⁴ it still reviewed whether the testimony of the witnesses at the BTA hearing supported the Tax Commissioner’s finding of lack of reasonableness.⁵

Ohio case law is replete with examples of the BTA or a reviewing court considering the reasonableness and good faith of a taxpayer’s behavior in determining whether a Tax Commissioner abused his or her discretion in not abating a tax penalty. In *Frankelite Company v. Lindley* (1986), 28 Ohio St.3d 29, the BTA affirmed the Tax Commissioner’s assessment, but reversed the penalty since the record established that the taxpayer reasonably relied in good faith on exemption certificates and had an established history of timely filing and paying its tax returns.⁶ Even the Tax Commissioner points out that the courts and BTA in *Frankelite; Kilbarger Const. Inc. v. Limbach* (April 14, 1987), 4th Dist. No. 450, unreported, aff’d 37 Ohio St.3d 234; and *Smink Electric v. Wilkins* (January 19, 2007), BTA No. 2005-B-1277, unreported, all considered and found that the taxpayer parties involved acted “in good faith,” or “in exceptional good faith”

³ R.C. 5747.15(C).

⁴ *J.M. Smucker, LLC v. Levin* (2007), 113 Ohio St.3d 337, 340.

⁵ *Id.* at 340-341.

⁶ *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29, 33.

when considering whether a Tax Commissioner's decision on tax penalties was an abuse of discretion⁷ Similarly, under the federal tax code, penalties for a taxpayer's failure to pay income taxes may be avoided if the taxpayer proves the failure to pay was due to reasonable cause and not willful neglect.⁸ Under federal law, if a return position is reasonably based on one or more of the authorities set forth in the substantial authority standard for a substantial underpayment penalty, the return position will generally satisfy the reasonable basis standard even in the absence of disclosure.⁹

Additionally, in a case similar to this one, this Court found in *NLO, Inc. v. Limbach* (1993), 66 Ohio St.3d 389 that where the Tax Commissioner has a longstanding policy relied upon by a taxpayer, the taxpayer acts reasonably in relying upon that policy until the Tax Commissioner's change in policy is definitively determined.¹⁰ In *NLO, Inc.*, the Tax Commissioner had a thirty-year policy of treating as tax-exempt purchases of supplies and equipment by a company that enriched uranium using funds received from the U.S. Department of Energy. On March 24, 1982, in *U.S. v. New Mexico* (1982), 455 U.S. 720, the U.S. Supreme Court held that federal immunity from state taxation does not apply to such purchase agreements.¹¹ In 1981, the Ohio Tax Commissioner filed an amicus brief in *U.S. v. New Mexico*, challenging the tax exempt status of the purchase agreements and later assessed sales tax on the uranium enrichment company for the period from October 1, 1981 through December 31, 1985.¹²

⁷ Tax Commissioner's Second Merit Brief at p. 23, ¶ 2.

⁸ *Olszonicki v. U.S.* (N.D. Ohio 1994), 867 F.Supp. 610, 613-614, citing 26 U.S.C.A. 6651(a) and *U.S. v. Boyle* (1984), 469 U.S. 241, 250 (holding that advice of an accountant or attorney pertaining to whether a client should file income tax returns concerns an issue of law, and it is reasonable for a taxpayer to rely on such advice, for purposes of determining whether the taxpayer is subject to penalty).

⁹ *Candyce Martin 1999 Irrevocable Trust v. U.S.* (2011), 822 F. Supp.2d 968, 1013.

¹⁰ *NLO, Inc. v. Limbach* (1993), 66 Ohio St.3d 389, 396.

¹¹ *Id.* at 389.

¹² *Id.*

As in this case, the Tax Commissioner did not assess years prior to the date he publicized his position in 1981. The Ohio Supreme Court held that the taxpayer reasonably relied upon the Tax Commissioner's previous policy treating the transactions as tax exempt through the date the Tax Commissioner publicly attacked the position in 1981 until the issue was definitively determined by *U.S. v. New Mexico* in 1982.¹³ Accordingly, the Court held that the transactions were exempt from taxation until after the March 24, 1982 *U.S. v. New Mexico* decision and reversed the BTA's decision that had upheld the Tax Commissioner's assessments prior to that date.¹⁴

In the same way, the Renaccis reasonably relied in good faith on the IRS's decision not to issue regulations taxing income of grantor ESBT trusts to the grantors whose trusts terminated before December 29, 2000 and upon the Tax Commissioner's public policy to not tax such income to grantors before 2000. The Tax Commissioner did not apply this new policy retroactively to prior years, and did not audit ESBT income back to 1996, when an ESBT became a permissible shareholder of an S Corporation. Nor did the IRS retroactively apply income tax to ESBT income; had the income at issue been earned in the preceding year, the Renaccis would not have even been liable for any Ohio tax on such income. The Ohio General Assembly also chose not to take any action to clarify tax laws concerning ESBT income, while some legislators referred to the Tax Commissioner's proposed change as a "tax increase."¹⁵ The Tax Commissioner's Information Release IT 2000-01 (January 19, 2000) ("2000 Information 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

¹³ *Id.* at 396.

¹⁴ *Id.*

¹⁵ See, February 21, 1999 *Columbus Dispatch* Article, "Bill Would Sew Up Tax Loophole", quoting Rep. Jamie Callender in Tax Commissioner's March 19, 2015 Supplement at p. TC Supp. 27.

grantor trust provisions of the Internal Revenue Code.”¹⁶ High level Department of Taxation personnel such as Jeffrey P. Sherman (former Legal Counsel for the Income Tax Division of the Ohio Department of Taxation) and Carol Bessey (former Deputy Commissioner Over Policy of the Ohio Department of Taxation), also publicly acknowledged that the Tax Commissioner had not previously taxed ESBT income on individuals,¹⁷ while the Tax Commissioner himself admitted that prior to the tax year 2000, grantor trust ESBT elections were a widely-used strategy to achieve tax savings.¹⁸ (The Renaccis sought additional testimony from these Ohio Department of Taxation personnel at pre-hearing depositions and through hearing testimony that was wrongfully denied by the BTA.)¹⁹

The Renaccis also reasonably relied upon the unsettled state of case law concerning this issue, which necessitated resolution through two Ohio Supreme Court decisions. Justice O’Donnell’s dissent in *Knust v. Wilkins* (2006), 111 Ohio St.3d 331 took the position that a grantor trust making an ESBT election would **not** be taxable if the ESBT terminated prior to December 29, 2000 as occurred with the Renacci Trust.²⁰ This remained unresolved until November 2007, when the Ohio Supreme Court issued its decision in *Lovell v. Levin* (2007), 116 Ohio St.3d 200 and definitively held that income of an ESBT which terminated before December 29, 2000 was taxable to the grantor. During the intervening period, the Renaccis voluntarily fully disclosed their ESBT

¹⁶ Hearing Exhibit “3”, Ohio Department of Taxation Information Release IT-2000-01 (January 19, 2000), p.1, ¶ 5 (Emphasis added).

¹⁷ Hearing Transcript, pp. 175:24-176:11 and 200:17-22.

¹⁸ *Id.* at p. 163:3-18.

¹⁹ The BTA abused its discretion and prejudiced the Renaccis’ ability to fully prepare for and present their case at hearing by not allowing the Renaccis to take pre-hearing depositions of former Tax Commissioner Thomas M. Zaino, former Ohio Department of Taxation personnel Carol Bessey and Jeffrey P. Sherman, and current Ohio Department of Taxation employee, Margaret Brewer, and by not allowing hearing questions of Zaino, Sherman and Brewer concerning the Tax Commissioner’s change in policy on ESBT’s or his general enforcement of past or current ESBT policy. The Renaccis were not seeking any information protected by the attorney-client privilege or deliberative process privilege asserted by the Tax Commissioner’s counsel.

²⁰ *Knust v. Wilkins* (2006), 111 Ohio St.3d 331, 337-338.

income to the Tax Commissioner through three (3) separate and timely filed Notices of S Corporation Status and, in negotiations with the Tax Commissioner, ultimately 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 2007.²¹ Most of these payments were made prior to the *Lovell* decision. This history and context should have been considered by the Tax Commissioner and the BTA in determining whether the Renaccis acted reasonably, in good faith, and without willful neglect, rather than to automatically determine that the Renaccis had not acted reasonably solely because they had not followed the Tax Commissioner's change in policy – a policy that was not settled by the Court until late 2007.

Additionally, the Tax Commissioner found that other taxpayers who did not pay personal income taxes on ESBT income acted reasonably, in good faith, and without willful neglect in making the decision to offer tax abatement to them. Margaret Brewer, Administrator of Appeals Management for the Ohio Department of Taxation, testified that abatement offers were made to eleven (11) taxpayers who were assessed for using the grantor-trust/ESBT device.²² To even make these offers, the Tax Commissioner had to find that the taxpayers acted reasonably, in good faith, and without willful neglect. Nevertheless, the Tax Commissioner inconsistently argues that the Renaccis' use of the same tax planning mechanism was unreasonable.

The Tax Commissioner further surprisingly claims that the three separate Notices of S Corporation Status timely filed by the Renaccis did not provide notice to the Tax Commissioner of the ESBT income. However, an audit of the Renaccis' 2000 Tax Return was triggered due to their disclosure, through these filings, which unequivocally identified the Renacci Trust as an ESBT

²¹ Renacci Affidavit at ¶ 9.

²² *Id.*

holding shares in the S Corporations and fully reported their net income.²³ Interestingly, on page one of the 2001 Notice (which pertained to the 2000 tax year), there was a new box next to the following new question: “During any portion of calendar year 2000 or other taxable year ending in 2000 was any shareholder/stockholder an electing small business trust (ESBT)?”²⁴ The box that was checked on all three filings stated “yes” next to that question. Surely, this box and question were added due to the Tax Commissioner’s policy change concerning the taxation of ESBT income. Accordingly, reporting the ESBT income on the three (3) separate Notices of S Corporation Status was actually a more open and obvious disclosure of the income than on a multi-page personal income tax return, where the Tax Commissioner proscribed notice could have been buried. Unlike a personal income tax return, the Notices of S Corporation Status were specifically designed to report the information necessary for the Tax Commissioner to recognize ESBT income. Again, all of the Notices of S Corporation Status provided by the Ohio Department of Taxation for prior tax years (notices filed in 1993 through 2000) did not contain a specific box to designate ESBT income.²⁵ Given this history, does the Tax Commissioner realistically expect this Court to believe these Notices did not fully apprise the Tax Commissioner of the ESBT income at issue, thereby triggering the audit?

Because of the clarity of the Renaccis’ disclosure of ESBT income through the Notices of S Corporation Status, the Tax Commissioner seeks to undermine their validity for the first time

²³ Renacci Affidavit at ¶ 11.

²⁴ See, 2001 Notices of S Corporation Status FT-1120-S for LTC Management Services, Inc., LTC Management Services II, Inc., and LTC Supply Corporation at p. 1, attached as TC Supp. 18 - TC Supp. 23 to Tax Commissioner’s March 19, 2015 Supplement to Second Merit Brief.

²⁵ See, 1993-2000 Notices of S Corporation Status FT-1120-S attached to the Appendix to this Third Merit Brief as Exhibit “A.”

on appeal. The Tax Commissioner has not previously disputed that the Notices were filed, and in his own 2012 Final Determination, acknowledged the Renaccis' filing of them by concluding:

The claimants did not 'advise' the Tax Commissioner that they were excluding ESBT income from their personal income tax return, but rather checked "yes" on separate S Corporations' Form FT 1120-J indicating whether any shareholder/stockholder was an electing small business trust.²⁶

Additionally, the three Notices of S Corporation Status have always been a part of the record of the Renaccis' refund claim and were attached as exhibits to their Application for Personal Income Tax Refund, which is also included in the Tax Commissioner's Supplement filed in this Court,²⁷ as well as to the Affidavit of James B. Renacci filed with the BTA on April 28, 2014 (the "Renacci Affidavit").²⁸ Moreover, the BTA may consider affidavits submitted outside of a hearing in reaching a decision on a tax appeal.²⁹ The Tax Commissioner's arguments concerning the admissibility of the Notices of S Corporation Status and the Renacci Affidavit are, therefore, without merit and have no bearing on this appeal.

Even aside from the Renaccis' plain affirmative disclosure of the existence and amount of ESBT income through the Notices of S Corporation Status, the Tax Commissioner openly informed taxpayers about the ability to locate ESBT income through having access to equipment and databases with which to search for such income: "Using computer programs and IRS-supplied databases, the Department will identify Ohio taxpayers who have not fully complied with the requirements of that [2000] information release."³⁰ Presumably, the Tax Commissioner

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

²⁷ Tax Commissioner's March 19, 2015 Supplement to Second Merit Brief at pp. TC Supp. 11-TC Supp. 23.

²⁸ Affidavit of James B. Renacci filed in BTA Case No. 2012-k-1850 on April 28, 2014 ("Renacci Affidavit") at ¶ 11.

²⁹ See, *Hillenmeyer v. Cleveland Board of Review*, Slip Opinion No. 2015-Ohio-1623, ¶ 11 and *Saturday v. Cleveland Bd. of Review*, Slip Opinion No. 2015-Ohio-1625, ¶ 10 (affidavits submitted by witnesses without a BTA hearing were considered by the BTA and the Ohio Supreme Court on appeal).

³⁰ Ohio Department of Taxation Information Release PIT 2001-04 (July 3, 2002) at p. 1, ¶ 2, attached to Hearing Exhibit "5", March 25, 2003 Ohio Department of Taxation letter of assessment.

contemplated that some taxpayers would not be filing Notices of S Corporation Status, and this statement was a warning thereto. With other resources available, it is therefore disingenuous for the Tax Commissioner to now claim that his office was not capable of determining even from the Notices of S Corporation Status that the Renaccis were utilizing an ESBT/grantor trust device for tax planning purposes.³¹ In any event, the Tax Commissioner was able to, and did, complete an audit of the ESBT income utilizing the Notices of S Corporation Status and the Renaccis' other tax records. When he did, he found that the Renaccis' actually disclosed more income on the Notices than their actual taxable income.³²

The unreasonable and arbitrary extent to which the Tax Commissioner has gone in an attempt to justify his position against penalty abatement for the Renaccis is illustrated by the Tax Commissioner's inexplicable allegation in his Second Merit Brief that the Renaccis "...committed fraud and violated the Commissioner's clear instruction, by failing to disclose the existence of an unlawful tax shelter device on his tax return, for which the Commissioner may impose a far more severe statutory fraud penalty under R.C. 5747.15(A)(6)."³³ This allegation ignores the unrefuted fact that the Tax Commissioner has never assessed fraud penalties on the Renaccis.³⁴ Margaret Brewer, of the Ohio Department of Taxation, testified that fraud penalties were not assessed upon the Renaccis.³⁵ Although the Tax Commissioner's Information Release PIT 2001-04 (July 3, 2002) ("2002 Information Release") provided that "[t]he Department will

³¹ Tax Commissioner's Second Merit Brief at p. 16, ¶ 2.

³² The three Notices of S Corporation Status disclosed net income of \$14,388,881 (See Notices of S Corporation Status attached to Tax Commissioner's March 19, 2015 Supplement to Second Merit Brief at pp. TC Supp. 18 - TC Supp. 23), while the Renaccis' 2000 taxable year federal adjusted gross income was found to be \$13,899,960 from Tax Commissioner's Form IT-4549 (See Brief of Appellee Tax Commissioner at p. 8, ¶ 1 attached to Tax Commissioner's March 19, 2015 Appendix to Merit Brief at p. TC Appx. 34).

³³ Tax Commissioner's Second Merit Brief at p. 26, ¶ 2.

³⁴ Hearing Transcript at 65:14-19.

³⁵ *Id.*

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,”³⁶ the Tax Commissioner’s earlier 2000 Information Release did not contain a similar disclosure requirement. So, the Renaccis filed their 2000 personal income tax return in August 2001 and also voluntarily filed the Notices of S Corporation Status, all well before the Tax Commissioner mandated disclosure in his subsequent 2002 Information Release. For the Tax Commissioner to now accuse the Renaccis of fraud under these circumstances after already making the determination that no fraud was committed is insulting to both this Court and the Renaccis.

If the Renaccis’ disclosure of their ESBT income in their Notices of S Corporation Status was not clear and prominently displayed, as the Tax Commissioner now alleges, the Tax Commissioner would have assessed fraud penalties under the 2002 Information Release. He did not. This is because the Tax Commissioner found that the Renaccis were not hiding the existence of, nor the amount of, their ESBT income and were not acting in bad faith. By both fully disclosing their income while making payment of substantially all of the tax and interest before the taxability of ESBT income to grantors was conclusively determined by the Court, the Renaccis acted with reasonable cause and without willful neglect pursuant to R.C. 5747.15(C). It is both proper and necessary for this Court to take this into account in deciding whether the Tax Commissioner abused his discretion. The BTA erred in only considering the Tax Commissioner’s new prospective policy when determining if the Renaccis’ conduct met the standard of

³⁶ 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.

reasonableness and without willful neglect, rather than to address the Renaccis' historic actions in light of the entirety of the procedural and legal circumstances.

B. PROPOSITION OF LAW NO. II: THE TAX COMMISSIONER ABUSES HIS OR HER DISCRETION IN DENYING A PENALTY ABATEMENT IN AN UNREASONABLE, ARBITRARY AND UNCONCIONABLE MANNER.

PROPOSITION OF LAW NO. III: THE TAX COMMISSIONER'S CONDITIONING PENALTY ABATEMENT UPON RECEIVING PAYMENT AND WAIVER OF APPEAL RIGHTS IS AN ABUSE OF DISCRETION AND A TAKING WITHOUT THE RIGHT TO DUE PROCESS OF LAW.

The Tax Commissioner Abused His Discretion in Denying a Penalty Abatement for the Renaccis and in Unreasonably and Arbitrarily Conditioning Abatement on Effectively Immediate Payment and Waiving Appeal Rights.

The Tax Commissioner's determination as to penalty abatement is subject to an abuse of discretion review,³⁷ which is defined as "...a decision that is unreasonable, arbitrary or unconscionable."³⁸ It is an abuse of discretion where the Tax Commissioner chooses to waive penalties in some, but not all, identical situations.³⁹ It is undisputed that the Tax Commissioner did not abate the penalty imposed upon the Renaccis. The BTA erred in finding that the Tax Commissioner did not abuse his discretion in not abating the penalty simply because the Renaccis did not pay personal income tax on ESBT income consistent with the Tax Commissioner's newly announced prospective policy. How the Tax Commissioner arrived at that decision and what he offered to the Renaccis and other similarly situated taxpayers is relevant and properly reviewable by both the BTA and this Court to determine if the Tax Commissioner abused his discretion.

³⁷ *Gibson v. Limbach* (April 24, 1992), Ohio BTA No. 89-F-287.

³⁸ *Jennings & Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70.

³⁹ *Hill v. Tracy*, BTA Case No. 99-K-145 (July 30, 1999).

In his Second Merit Brief, the Tax Commissioner attempts to make an improper distinction by arguing that the abuse of discretion standard should be applied to the Tax Commissioner's decision not to grant penalty abatement, but should not be applied to his decision to condition penalty abatement on the Renaccis making payment within a very short timeframe and waiving their appeal rights. The Tax Commissioner cites *Ashland Cty. Bd. of Commrs. v. Ohio Dept. of Taxation* (1992), 63 Ohio St.3d 648 to contend that the Tax Commissioner has unfettered discretion to settle tax assessments. However, *Ashland Cty. Bd. of Commrs.* did not involve a taxpayer's appeal of a tax assessment or penalty abatement and instead involved a challenge to an agreement reached between the Ohio Department of Taxation and a public utility which phased in taxation of previously untaxed property.⁴⁰ Prior to this agreement, the property at issue had not been considered taxable, and the Ohio Supreme Court held that the Tax Commissioner had discretion to enter into an agreement with the taxpayer to make the property taxable.⁴¹ The *Ashland Cty. Bd. of Commrs.* decision is not applicable to this current appeal since it did not involve penalty abatement nor any policy change occurring without the taxpayers' consent. If anything, the decision's reasoning supports the view that it would have been more reasonable for the Tax Commissioner to phase in a change in policy concerning the taxation of ESBT income over time once corresponding federal or Ohio law was finally determined, rather than to arbitrarily declare that ESBT income must be included in a grantor's taxable income prospectively for post-1999 tax years.

The Tax Commissioner abused his discretion by imposing and maintaining a penalty simply because the Renaccis' 2000 Personal Income Tax Return reported a position contrary to

⁴⁰ *Ashland Cty. Bd. of Commrs. v. Ohio Dept. of Taxation* (1992), 63 Ohio St.3d 648, 656.

⁴¹ *Id.*

the Tax Commissioner's prospective and unresolved policy change on ESBT income. In his Second Merit Brief, the Tax Commissioner makes the statement that the 2002 Information Release "...detail[ed] how Ohio income taxpayers could, in good faith, assert the validity of their use of the ESBT/grantor trust device..."⁴² However, as discussed below, the Tax Commissioner established an arbitrary and unreasonable practice of imposing penalties on grantors who did not pay income taxes on ESBT income for post-1999 tax years, whether or not they disclosed the ESBT income on their income tax returns.

In the 2002 Information Release, the Tax Commissioner referenced imposing a failure-to-pay penalty on all grantors who did not pay tax on ESBT income commencing with the 2000 tax year.⁴³ The Tax Commissioner further stated that "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."⁴⁴ Accordingly, if a grantor did not pay tax on ESBT income, yet disclosed it, the Tax Commissioner would not assess fraud penalties, but would still assess failure-to-pay penalties. So, even if a taxpayer disclosed their use of an ESBT/grantor trust device for tax planning purposes according to the Tax Commissioner's definition of "good faith" in the 2000 Information Release, the Tax Commissioner would still impose penalties upon them. For the Tax Commissioner to have instituted such a draconian policy was unreasonable, arbitrary and unconscionable.

⁴² Tax Commissioner's Second Merit Brief at p. 5, ¶ 2.

⁴³ Ohio Department of Taxation Information Release PIT 2002-04 (July 3, 2002) at ¶ 2. attached to Hearing Exhibit "5", March 25, 2003 Ohio Department of Taxation letter of assessment.

⁴⁴ *Id.*

In enforcing the new prospective policy set forth in the 2000 Information Release, the Tax Commissioner also arbitrarily took the position that penalties would only be avoided if taxpayers paid taxes on ESBT income prior to assessment during the course of an audit,⁴⁵ or paid such tax after assessment but waived their appeal rights.⁴⁶ Under R.C. 5747.13(E) and (F), Ohio taxpayers have the right to appeal tax decisions without making payment on the assessed taxes. As R.C. 5747.13 provides, “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.”⁴⁷ The Tax Commissioner’s decision to abate 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 violated their Due Process rights by effectively giving them no option to test the Tax Commissioner’s new policy before the BTA or the courts without parting with their property. The Tax Commissioner effectively penalized a taxpayer’s choice to appeal and continuing to challenge the assessment.

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.⁴⁸ Although the Tax Commissioner ultimately offered to reduce the Renaccis’ penalty to 5% of the tax, he arbitrarily conditioned the offer on payment of the tax, interest, and reduced penalty of approximately \$1.4 million in less than two (2) weeks.⁴⁹ The Renaccis accepted the reduction in penalty, but informed the Tax Commissioner they were unable to make this large payment so quickly, offering to pay the full penalty (i.e., no penalty abatement) if they did not

⁴⁵ *Id.*

⁴⁶ Hearing Exhibit “D”, Affidavit of Margaret Brewer at ¶ 6.

⁴⁷ R.C. 5747.13(F).

⁴⁸ Renacci Affidavit at ¶ 7.

⁴⁹ Hearing Exhibit “6”, April 17, 2007 email exchange between Appellee’s counsel, Bart Hubbard and Appellants’ counsel, Steve Dimengo.

make payment by the end of the year (within eight (8) months). James Renacci was also unable to pay within the less than two (2) weeks offered by the Tax Commissioner due to having surgery at that time.⁵⁰

The Tax Commissioner did not accept the Renaccis' payment offer. However, other taxpayers who took the identical position as the Renaccis had their penalties abated when they paid the tax, interest and penalties demanded by the Tax Commissioner within a month,⁵¹ and taxpayers that paid before being assessed clearly would have been allowed much more than a month to make payment. The Tax Commissioner admits that the Renaccis' case is essentially 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 the merits of the tax liability.⁵² The Tax Commissioner's representative, Margaret Brewer, also admitted that the Tax Commissioner had no concern as to the Renaccis' collectability for the tax and interest portions of the assessment if they continued to exercise their appeal rights.⁵³ In fact, the Renaccis actually paid all of the taxes, interest and penalties by the end of 2007. Nevertheless, the Tax Commissioner abused his discretion by treating the similarly situated Renaccis as if they had been willfully neglectful or acted in bad faith only because they were unable to make payment on a penalty reduction sooner than possible (and did not pay before being assessed, as some of the other taxpayers).⁵⁴

⁵⁰ *Id.* and Renacci Affidavit at ¶ 8.

⁵¹ Hearing Exhibit "D", Affidavit of Margaret Brewer at ¶ 6.

⁵² *Id.* at ¶¶ 6-7.

⁵³ Hearing Transcript at 88:19-22.

⁵⁴ As a side note, there clearly would be no penalty applied for federal income tax purposes due to the Renaccis' disclosure, and there would not have been a penalty even without disclosure due to the reasonableness of the Renaccis' position. See, *Olszonicki v. U.S.* (N.D. Ohio 1994), 867 F.Supp. 610, 613-614, 26 U.S.C.A. 6651(a) and *U.S. v. Boyle* (1984), 469 U.S. 241, 250. This reiterates the fundamental problem that the Tax Commissioner only abated the penalty upon paying the tax and interest and relinquishing appeal rights after an assessment.

In summary, the Renaccis were assessed an unconscionable penalty only because they chose to pursue their appeal rights concerning the merits of the tax liability and could not pay the full amount of tax and interest assessed in less than two weeks as required by the Tax Commissioner. This was clearly an abuse of discretion by the Tax Commissioner since no tax concession was allowed despite the Renaccis' open and timely disclosure of their position, their unquestioned collectability, and the relevant Supreme Court case that was still pending. The Tax Commissioner assessed the maximum, double interest penalty even though the Renaccis acted reasonably and in good faith, and had timely and accurately filed their tax returns in prior years. 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, as well as a violation of due process, because it is an improper taking. The BTA erred in finding that the Tax Commissioner did not abuse his discretion in both assessing and not abating penalties.

C. **RESPONSE TO TAX COMMISSIONER'S PROPOSITION OF LAW NO. III:**

Ohio Taxpayers Have the Right to Seek Refunds of Income Tax Penalties Pursuant to R.C. 5703.60(A)(3) and R.C. 5717.02 Where a Decision on the Merits of an Objection to Penalties in a Petition for Reassessment has not Previously Been Rendered by the BTA or a Court and may Pursue Penalty Abatement Through a Refund Claim under R.C. 5747.11 on an Erroneous or Excessive Assessment.

The BTA properly found that under R.C. 5703.60(A)(3) and R.C. 5717.02, taxpayers have the right to seek refunds of paid income tax penalties where a decision on the merits of an objection to the penalties in a petition for reassessment has not previously been issued by the BTA or a Court.⁵⁵ In pertinent part, R.C. 5703.60(A)(3) unambiguously provides: "Only

⁵⁵ BTA Decision at p. 3, ¶ 4.

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.”⁵⁶ The BTA has applied the unequivocal language of R.C. 5703.60(A)(3) to determine:

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.”⁵⁷

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. 5717.02.⁵⁸

Furthermore, the Renaccis had the right to pursue penalty abatement through a refund claim under R.C. 5747.11 on an erroneous or excessive assessment. As required by R.C. 5747.11, the amount paid by the Renaccis was with respect to a tax imposed under Section 5747 of the Revised Code.⁵⁹ Additionally, the amount paid was on an “erroneous” assessment pursuant to R.C. 5747.11 since the Tax Commissioner assessed a double-interest penalty on a prospective change in tax policy without a corresponding change in the law.⁶⁰ The Renaccis’ refund claim was also properly based upon the assessment being “excessive” under R.C. 5747.11 since the Tax Commissioner did not abate the double interest penalty despite the Renaccis acting with reasonable cause and not willful neglect.⁶¹

⁵⁶ R.C. 5703.60(A)(3).

⁵⁷ BTA Decision at p. 3, ¶ 4.

⁵⁸ *Id.*, citing R.C. 5703.60(A)(3).

⁵⁹ R.C. 5747.11(B)(1)(a).

⁶⁰ R.C. 5747.11 (B).

⁶¹ R.C. 5747.15(C).

Despite this clear statutory authority to the contrary, the Tax Commissioner wrongly argues that the BTA did not have jurisdiction to hear the Renaccis' appeal of the Tax Commissioner's 2012 Final Determination which denied their refund claim on the penalties and interest assessed on ESBT income. The Tax Commissioner ignores the fact that neither the BTA, nor the Tax Commissioner himself, had previously fully adjudicated the Renaccis' penalty abatement claim and even goes so far as to wrongly represent that "[I]n the Renaccis' previous litigation regarding their 2000 tax year Ohio income tax assessment liability, all of those issues were finally and conclusively determined against the Renaccis' challenges."⁶² The Renaccis first filed a Petition for Reassessment to challenge the tax, interest and penalty assessment of the Tax Commissioner in July 2003 ("2003 Petition for Reassessment"). Yet, the Tax Commissioner failed to even specifically address the Renaccis' request for penalty abatement in his 2006 Final Determination of the 2003 Petition for Reassessment (the "2006 Final Determination"). The Renaccis then appealed the 2006 Final Determination to the BTA ("First Appeal"), but later dismissed it in March 2008 after having paid all of the assessed taxes and interest as a result of the decisions rendered on ESBT income tax liability in *Knust v. Wilkins* (2006), 111 Ohio St.3d 331 and *Lovell v. Levin* (2007), 116 Ohio St.3d 200. A decision was never rendered by the BTA on the Renaccis' First Appeal.

In order to entice the Renaccis into paying the full double-interest penalty, including additional accrued interest, in the amount of \$359,822, the Tax Commissioner entered into an agreement with the Renaccis to address penalty abatement in a separate appeal via a refund claim.⁶³ This agreement between the parties was confirmed in writing on March 10, 2008 by

⁶² Tax Commissioner's Second Merit Brief at p. 2, ¶ 2.

⁶³ Renacci Affidavit at ¶ 10.

Margaret Brewer, the Tax Commissioner's Executive Administrator of Appeals Management.⁶⁴

The Tax Commissioner's own counsel (Bart Hubbard), again representing the Tax Commissioner in this appeal, concurred in an email communication sent to the Renaccis' counsel:

"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."⁶⁵

Ms. Brewer also testified that the Renaccis could 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.⁶⁶

Finally, the Tax Commissioner also ruled on the Renaccis' application for a penalty refund in his 2012 Final Determination, without making any finding that the Renaccis' were jurisdictionally or otherwise procedurally barred from pursuing a refund.

Despite all of this prior acceptance and agreement that the Renaccis could file a penalty refund claim, the Tax Commissioner is now claiming that his representatives' written representations to the Renaccis (as well as counsel's concurrence) agreeing to their pursuit of a refund appeal were "harmless error."⁶⁷ Inconsistently, in order to try to avoid the BTA's and this Court's scrutiny of his actions in assessing and not abating penalties, the Tax Commissioner argues

⁶⁴ 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.

⁶⁵ March 7, 2008 email from Bart Hubbard to Appellants' counsel at ¶ 5, included in Hearing Exhibit "13".

⁶⁶ Hearing Transcript at p. 130:13-18.

⁶⁷ Tax Commissioner's Second Merit Brief at p. 35, footnote 8.

that he has nearly unfettered discretion to enter into settlement agreements with taxpayers.⁶⁸ However, the Tax Commissioner cannot have it both ways. As this Court has previously held, taxpayers are justified in relying upon the Tax Commissioner's representations in appealing tax assessments and in following longstanding tax policy.⁶⁹ Where, as here, the Tax Commissioner did not dismiss a petition on jurisdictional grounds, the BTA limits its review of the Tax Commissioner's decision to the statutes considered, rather than any alleged jurisdictional issues.⁷⁰

Since the Renaccis dismissed their First Appeal without the BTA rendering a decision on their original request for penalty abatement, the BTA was correct in finding that it had jurisdiction under R.C. 5703.60(A)(3) to consider those penalty objections in the Renaccis' application for a refund.⁷¹ This is true even if the Tax Commissioner had not consented to having these penalty objections heard in a refund claim conditioned upon the Renaccis dismissing their First Appeal and paying the full penalty.⁷² The Renaccis also have the right to pursue a refund of an erroneous or excessive assessment under R.C. 5747.11. The BTA's holding recognizing its jurisdiction to have heard this appeal of a penalty refund claim should therefore be affirmed.

III. SUMMARY AND CONCLUSION

The BTA erred in finding that the Renaccis acted with willful neglect simply by not following the Tax Commissioner's prospective policy change concerning the taxation of ESBT income. The proper standard for reasonableness and willful neglect was to consider the Tax Commissioner's history of practices and policies with respect to income earned from ESBTs, as

⁶⁸ *Id.* at p. 29, ¶ 2.

⁶⁹ *Crown Communication, Inc. v. Testa* (2013), 136 Ohio St.3d 209, ¶ 31 and *NLO, Inc. v. Limbach* (1993), 66 Ohio St.3d 389, 396.

⁷⁰ *Mt. Sinai v. Wilkins* (February 2, 2010), BTA No. 2006-M-2129, 2010 WL 415427, unreported, *3 and *Grace Chapel v. Levin* (May 4, 2010), BTA No. 2007-K-835, 2010 WL 1832532, unreported, *5.

⁷¹ BTA Decision at p. 3, ¶ 5.

⁷² Hearing Exhibit "13", March 10, 2008 email exchange between Appellee's Executive Administrator of Appeals Management, Margaret Brewer and Appellants' counsel, Steve Dimengo.

well as the Renaccis' reasonable reliance on relevant longstanding 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. The BTA also erred in not finding that the Tax Commissioner abused his discretion in not abating the penalty. Both of these central issues should be decided in favor of the Renaccis based upon the unique factual and legal circumstances of this case, which have already been described in detail, but which are summarized below:

The Renaccis' position on ESBT income was reasonable because:

- it was consistent with the Tax Commissioner's pre-2000 policy;
- the Tax Commissioner's policy change was prospective and did not involve assessing taxpayers for prior years;
- the IRS also did not apply any change to ESBT policy retroactively;
- two Ohio Supreme Court decisions (*Knust* and *Lovell*) were necessary to definitively determine whether income earned by grantor ESBT's was taxable to the grantor;
- Justice O'Donnell's dissent 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;
- the Renaccis paid the assessed tax and interest predominantly before the second and final relevant Ohio Supreme Court decision (*Lovell*);

- high level Department of Taxation personnel, including Jeffrey Sherman and Carol Bessey, publicly stated that treating ESBT income as nontaxable to the grantor was a legitimate tax-planning strategy;
- Margaret Brewer's Affidavit confirmed the Tax Commissioner abated some taxpayers' ESBT-related penalties and therefore found their actions to be reasonable;
- the Ohio General Assembly chose not to enact legislation to clarify tax laws concerning ESBT income, and some legislators referred to the Tax Commissioner's proposed change as a "tax increase" and
- tax practitioners debated the taxability of ESBT-related income, which was recognized as a reasonable difference of opinion by the 2000 Information Release and by the Tax Commissioner's public statements as a private tax practitioner prior to becoming tax commissioner.

The Renaccis acted in good faith and without willful neglect by fully apprising the Tax Commissioner of their position via timely filed Notices of S Corporation Status since:

- the Tax Commissioner recognized the Notices as disclosure by not imposing a fraud penalty under the Tax Commissioner's policy guidelines;

- the Renaccis timely filed three (3) separate Notices of S Corporation Status, any one of which could have triggered the audit –
 - 1) the marked “yes” box on page 1 of the Notices denotes the existence of an ESBT; and
 - 2) the “yes” box and accompanying question on page 1 of the Notices was not on Notices of S Corporation Status prior to 2001, meaning its sole purpose was to alert the Tax Commissioner of ESBT trusts for tax year 2000 to trigger audits;
- filing the Notices gave more direct notice than the Tax Commissioner prescribed disclosure since the information was on page one and not buried in an income tax return;
- they voluntarily disclosed the ESBT income before the Tax Commissioner issued a disclosure requirement in the 2002 Information Release after the Renaccis’ 2000 tax return and Notices were filed in 2001; and
- they timely disclosed income greater than their actual taxable income.

The Renaccis did not commit fraud because:

- their position was reasonable as outlined above;

- the Tax Commissioner did not impose a fraud penalty upon them;
and
- the Tax Commissioner's representative, Margaret Brewer, testified that the Tax Commissioner did not make a finding of fraud against the Renaccis.

The Tax Commissioner abused his discretion in not abating the penalty imposed upon the Renaccis and infringed upon their Due Process rights because:

- the Tax Commissioner did not impose a penalty and preserved taxpayers' refund rights on the merits only if they paid the tax before assessment during the course of the audit -
 - 1) This effectively penalized taxpayers like the Renaccis pursuing an appeal, who waited for the results of the assessment and challenged the unsettled new policy.
 - 2) Taxpayers who paid before they were assessed were given a much longer time to pay than the less than two (2) weeks offered to the Renaccis.
- after assessment, the Tax Commissioner only abated the penalty if:
 - 1) the taxpayers paid within a month, other than the Renaccis, who were given less than two (2) weeks, despite –

- a) there being no collectability issues, confirmed by both Margaret Brewer's testimony and by the Renaccis' actual payment before year end; and
 - b) the Renaccis' agreement to pay the full penalty if not paid by year end (within eight (8) months); and
- 2) the taxpayers relinquished appeal rights concerning the merits of the tax.

- by analogy, no penalty would have been imposed for federal income tax purposes and would not have even mandated disclosure due to the reasonableness of the Renaccis' position.

There are no factual disputes in this appeal. Although there is a significant burden in proving the Tax Commissioner's abuse of discretion, his actions do meet this threshold. The fundamental issue in this case is whether a taxpayer should be penalized for fully disclosing their position in following a longstanding and acceptable tax planning practice, as recognized by the Tax Commissioner, which is then prospectively changed by the Tax Commissioner without any corresponding change in law. The Tax Commissioner arbitrarily penalized the Renaccis unless they agreed to pay tax and interest in a very short timeframe and either filed a pre-assessment refund claim or relinquished their rights to appeal post-assessment. Other taxpayers were given more time to pay or retained their appeal rights. The Tax Commissioner's decision to abate a portion of the penalty only for those taxpayers who paid tax and interest in full on the ESBT income and who waived their appeal rights is a taking of property without Due Process of law. This is also a totally inappropriate use of the penalty provisions, which are not intended to impede

appeals or to be used as a club by the Tax Commissioner to coerce waiver of Due Process rights by using the leverage of otherwise requiring the taxpayer to prove an abuse of discretion.

The Tax Commissioner's own 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. Under R.C. 5703.60(A)(3) and R.C. 5717.02, taxpayers have the right to seek refunds of income tax penalties where a decision on the merits of penalty objection in a petition for reassessment has not previously been reached by the BTA or a court and may pursue penalty abatement through a refund claim under R.C. 5747.11 on an erroneous or excessive assessment. For the Tax Commissioner to now raise these alleged jurisdictional issues, which he never previously raised in his 2012 Final Determination, and to also newly allege that the Renaccis committed fraud, when he himself previously found that they did not, are smokescreens designed to inflate the rhetoric of this proceeding and are an insult to the Court and to the Renaccis.

The BTA erred in upholding the Tax Commissioner's 2012 Final Determination and also in not allowing the deposition and hearing testimony of the former Tax Commissioner and his representatives about the policy on ESBT income. Other than on its holdings regarding jurisdiction, the BTA's Decision should be overturned and the penalty assessed to the Renaccis should be abated and refunded in the amount of \$359,822 plus interest.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Third Merit Brief of Appellants/Cross-Appellees was served by electronic mail to barton.hubbard@ohioattorneygeneral.gov on the 11th day of May 2015 and by Ordinary U.S. Mail, postage prepaid, on the 11th day of May 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

AK3:1196922_v2

APPENDIX

FT-1120-S **OHIO** **1993**
 NOTICE OF S CORPORATION STATUS

FOR DEPARTMENT USE ONLY

For calendar year 1992 or other taxable year beginning _____, 1991, ending _____, 1992.

If you are not receiving your forms at the correct address or you wish to advise us of a change in your mailing address, please check the box. Indicate your **correct mailing address** in the space below.

PLEASE TYPE OR PRINT	Name of Corporation	Ohio Franchise Tax ID No.
	Number and Street	Ohio Charter or License No.
	City, State, Zip Code	Fed. Empl. ID No.

- File this form with the Ohio Department of Taxation between January 1 and March 31, 1993 if the corporation was an S corporation for any portion of 1992. **Filing this notice does not constitute the filing of any tax return otherwise required by law.**
- All individuals whose federal adjusted gross income includes a distributive share from an S corporation are subject to the Ohio individual income tax if the S corporation did business in Ohio or owned or used a part or all of its capital or property in Ohio for any portion of the period to which the distributive share relates.
- An S corporation may each year file a master income tax return, Form IT-1040M, on behalf of and as agent for its electing nonresident shareholders having no Ohio-sourced income other than their distributive share of income from the S Corporation.
- The Tax Commissioner has prepared a question and answer packet discussing the Department's policy interpretation of the taxation of S corporations and their shareholders. Requests for this packet should be addressed to the Ohio Department of Taxation, P. O. Box 182048, Columbus, Ohio 43218-2048, Attn: S Corporation Unit.

THE FOLLOWING INFORMATION MUST BE FURNISHED BY ALL S CORPORATIONS

President _____ Address _____

Secretary _____ Address _____

Treasurer _____ Address _____

Effective date of S election _____ Effective date of S termination (if applicable) _____

State of incorporation _____ Date of charter or license to do business in Ohio _____

This notice must be signed by an officer of the corporation (see reverse side). Fed. Bus. Activity Code No. _____

- Was this corporation a C corporation for any portion of 1992? Yes No. If yes, in addition to filing this notice the S corporation is subject to the 1993 franchise tax and must file form FT-1120.
- During 1991 or 1992 did a C corporation which was subject to the Ohio franchise tax merge into the S corporation? Yes No. If yes, the S corporation may be subject to the franchise tax on the income of the merged C corporation. See page 2 of the 1993 Ohio Corporation Franchise Tax Report Instructions and September 24, 1992 Franchise Tax Information Release "Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation".
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No. If yes, the shareholders must report such changes to the Ohio Department of Taxation in the form of amended Ohio Individual Income Tax Returns.

Shareholders

Provide the information below for all resident and non-resident shareholders (including estates and trusts) who held stock in the corporation any time during the corporation's accounting period ending in 1992. If any shareholder is a trust or an estate, also list the name, social security number, and address of each beneficiary of the trust or estate.

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE
1.			
2.			
3.			
4.			

(use back of form for additional listing)

Shareholders (continued)

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			
16.			
17.			
18.			
19.			

(attach additional sheet if necessary)

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by Sections 3517.082, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly paid, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatever, or for the reimbursement or indemnification of any person for money or property so used.

DATE	SIGNATURE OF OFFICER	TITLE
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DATE	Signature of Preparer other than Taxpayer based on all information of which Preparer has knowledge	ADDRESS
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FT-1120-S

OHIO
NOTICE OF S CORPORATION STATUS

1994

FOR DEPARTMENT USE ONLY

For calendar year 1993 or other taxable year beginning _____, 1992, ending _____, 1993.

If you are not receiving your forms at the correct address or you wish to advise us of a change in your mailing address, please check the box. Indicate your correct mailing address in the space below.

PLEASE TYPE OR PRINT	Name of Corporation	Ohio Franchise Tax ID No.
	Number and Street	Ohio Charter or License No.
	City, State, Zip Code	Fed. Empl. ID No.

- File this form with the Ohio Department of Taxation between January 1 and March 31, 1994 if the corporation was an S corporation for any portion of 1993. Filing this notice does not constitute the filing of any tax return otherwise required by law.
- All individuals whose federal adjusted gross income includes a distributive share from an S corporation are subject to the Ohio individual income tax if the S corporation did business in Ohio or owned or used a part or all of its capital or property in Ohio for any portion of the period to which the distributive share relates.
- An S corporation may each year file a master income tax return, Form IT-1040M, on behalf of and as agent for its electing nonresident shareholders having no Ohio-sourced income other than their distributive share of income from the S Corporation.
- The Tax Commissioner has prepared a question and answer packet discussing the Department's policy interpretation of the taxation of S corporations and their shareholders. Requests for this packet should be addressed to the Ohio Department of Taxation, P. O. Box 182048, Columbus, Ohio 43218-2048, Attn: S Corporation Unit.

THE FOLLOWING INFORMATION MUST BE FURNISHED BY ALL S CORPORATIONS

President _____ Address _____

Secretary _____ Address _____

Treasurer _____ Address _____

Effective date of S election _____ Effective date of S termination (if applicable) _____

State of incorporation _____ Date of charter or license to do business in Ohio _____

This notice must be signed by an officer of the corporation (see reverse side). Fed. Bus. Activity Code No. _____

- Was this corporation a C corporation for any portion of 1993? Yes No. If yes, in addition to filing this notice the S corporation is subject to the 1994 franchise tax and must file form FT-1120.
- During 1992 or 1993 did a C corporation which was subject to the Ohio franchise tax merge into the S corporation? Yes No. If yes, the S corporation may be subject to the franchise tax on the income of the merged C corporation. See page 3 of the 1994 Ohio Corporation Franchise Tax Report Instructions and September 24, 1992 Franchise Tax Information Release, "Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation".
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No. If yes, the shareholders must report such changes to the Ohio Department of Taxation in the form of amended Ohio Individual Income Tax Returns.

Shareholders

Provide the information below for all resident and non-resident shareholders (including estates and trusts) who held stock in the corporation any time during the corporation's accounting period ending in 1993. If any shareholder is a trust or an estate, also list the name, social security number, and address of each beneficiary of the trust or estate.

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE
1.			
2.			
3.			
4.			

Shareholders (continued)

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE
5.			
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18.			
19.			

(attach additional sheet if necessary)

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by Sections 3517.082, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly paid, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatever, or for the reimbursement or indemnification of any person for money or property so used.


DATE
SIGNATURE OF OFFICER
TITLE


DATE
Signature of Preparer other than Taxpayer based on all information of which Preparer has knowledge
ADDRESS

OHIO 1995

FT-1120-S NOTICE OF S CORPORATION STATUS

FOR DEPARTMENT USE ONLY

For calendar year 1994 or other taxable year beginning _____, 1993, ending _____, 1994.

If you are not receiving your forms at the correct address or you wish to advise us of a change in your mailing address, please check the box. Indicate your **correct mailing address** in the space below.

PLEASE TYPE OR PRINT	NAME OF CORPORATION	STATE OF INCORPORATION
OHIO FRANCHISE TAX ID NO.	NUMBER AND STREET	FEDERAL EMPLOYER ID NO.
OHIO CHARTER OR LICENSE NO.	CITY, STATE, ZIP CODE	FEDERAL BUSINESS ACTIVITY CODE NO.

- File this form with the Ohio Department of Taxation between January 1 and March 31, 1995 if the corporation was an S corporation for any portion of 1994. **Filing this notice does not constitute the filing of any tax return otherwise required by law.**
- An Ohio resident's distributive share of income from an S corporation is subject to the Ohio individual income tax even if the S corporation does no business in Ohio. However, Ohio residents may claim a resident credit for income subjected to income tax in another state.
- Any nonresident individual whose federal adjusted gross income includes a distributive share from an S corporation is subject to the Ohio individual income tax if the S corporation did business in Ohio or owned or used a part or all of its capital or property in Ohio for any portion of the period to which the distributive share relates.
- An S corporation may each year file a master income tax return, Form IT-1040M, on behalf of and as agent for its electing nonresident shareholders having no Ohio-sourced income other than their distributive share of income from the S Corporation.
- The Tax Commissioner has prepared a revised question and answer packet (dated July 31, 1994) that explains the Department's policy interpretation of the taxation of S corporations and their shareholders. Requests for this packet should be addressed to the Ohio Department of Taxation, P. O. Box 182048, Columbus, Ohio 43218-2048, Attn: S Corporation Unit.

THE FOLLOWING INFORMATION MUST BE FURNISHED BY ALL S CORPORATIONS

Statutory Agent	Corporate Officers
First Name _____ Middle Initial _____ Last Name _____ Street Address _____ (Do Not Give Post Office Box Address) City _____ State _____ Zip _____	President _____ First Name _____ Middle Initial _____ Last Name _____ Secretary _____ First Name _____ Middle Initial _____ Last Name _____ Treasurer _____ First Name _____ Middle Initial _____ Last Name _____

PLEASE TYPE OR PRINT

- Effective date of S election _____ Effective date of S termination (if applicable) _____
- Was this corporation a C corporation for any portion of 1994 prior to the effective date of an S election? Yes No. If yes, in addition to filing this notice the S corporation is subject to the 1995 franchise tax and must file form FT-1120.
- During 1993 or 1994 did a C corporation that was subject to the Ohio franchise tax merge into the S corporation? Yes No. If yes, the S corporation may be subject to the franchise tax on the income of the merged C corporation. See page 3 of the 1995 Ohio Corporation Franchise Tax Report Instructions and the September 24, 1992 Franchise Tax Information Release, "Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation".
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No. If yes, the shareholders must report such changes to the Ohio Department of Taxation in the form of amended Ohio Individual Income Tax Returns.

Shareholders

Provide the information below for all resident and non-resident shareholders (including estates and trusts) who held stock in the corporation any time during the corporation's accounting period ending in 1994. If any shareholder is a trust or an estate, also list the name, social security number, and address of each beneficiary of the trust or estate. **Please type or print.**

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE
1.			
2.			
3.			
4.			

(use back of form for additional listing)

Shareholders (continued)

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE
5.			
6.			
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14.			
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17.			
18.			
19.			

(attach additional sheet if necessary)

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by Sections 3517.082, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly paid, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatever, or for the reimbursement or indemnification of any person for money or property so used.


DATE
SIGNATURE OF OFFICER
TITLE


DATE
Signature of Preparer other than Taxpayer based on all information of which Preparer has knowledge
ADDRESS

OHIO

FT-1120-S NOTICE OF S CORPORATION STATUS **1996** FOR DEPARTMENT USE ONLY

For calendar year 1995 or other taxable year beginning _____, 1994, ending _____, 1995.

If you are not receiving your forms at the correct address or if you wish to advise us of a change in your mailing address, please check the box. Indicate your **correct mailing address** in the space below.

TYPE OR PRINT	OHIO FRANCHISE TAX ID NO.	NAME OF CORPORATION	STATE OF INCORPORATION
	OHIO CHARTER OR LICENSE NO.	NUMBER AND STREET ADDRESS	
	FEDERAL EMPLOYER ID NO.	CITY, STATE, ZIP CODE	FEDERAL BUSINESS ACTIVITY CODE NO.

If the corporation was an S corporation for any portion of 1995, please file this notice by the later of (i) March 31, 1996 or (ii) six months after the S corporation's fiscal or calendar year ending in 1995. **Filing this notice does not constitute the filing of any tax return otherwise required by law.**

An Ohio resident's distributive share of income from an S corporation is subject to the Ohio individual income tax even if the S corporation does no business in Ohio. However, Ohio residents may claim a resident credit for income subjected to income tax in another state.

Any nonresident individual whose federal adjusted gross income includes a distributive share from an S corporation is subject to the Ohio individual income tax if the S corporation did business in Ohio or owned or used a part or all of its capital or property in Ohio for any portion of the period to which the distributive share relates.

An S corporation may each year file a master income tax return, Form IT-1040M, on behalf of and as agent for its electing nonresident shareholders having no Ohio-sourced income other than their distributive share of income from the S Corporation.

THE FOLLOWING INFORMATION MUST BE FURNISHED BY ALL S CORPORATIONS

PLEASE TYPE OR PRINT

<p>Name _____</p> <p>Street Address (Do Not Give Post Office Box Address) _____</p> <p>City _____ State _____ Zip _____</p>	<p>Treasurer _____</p> <p style="text-align: center;">First Name Middle Initial Last Name</p>
---	---

- Effective date of S election _____ Effective date of S termination (if applicable) _____
- Was this corporation a C corporation for any portion of 1995 prior to the effective date of an S election? Yes No. If yes, in addition to filing this notice the S corporation is subject to the 1996 franchise tax and must file form FT-1120.
- During 1994 or 1995 did a C corporation that was subject to the Ohio franchise tax merge into the S corporation? Yes No. If yes, the S corporation may be subject to the franchise tax on the income of the merged C corporation. See page 3 of the 1996 Ohio Corporation Franchise Tax Report Instructions and the September 24, 1992 Franchise Tax Information Release, "Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation".
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No. If yes, the shareholders must report such changes to the Ohio Department of Taxation in the form of amended Ohio Individual Income Tax Returns.

Shareholders

Please provide the information requested on the back of this form for all resident and non-resident shareholders (including estates and trusts) who held stock in the corporation any time during the corporation's accounting period ending in 1995.

Shareholders (continued)

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE
5.			
6.			
7.			
8.			
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12.			
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15.			
16.			
17.			
18.			
19.			

(attach additional sheet if necessary)

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by Sections 3517.082, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly paid, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatever, or for the reimbursement or indemnification of any person for money or property so used.


DATE
SIGNATURE OF OFFICER
TITLE


DATE
Signature of Preparer other than Taxpayer based on all information of which Preparer has knowledge
ADDRESS

OHIO

FT-1120-S NOTICE OF S CORPORATION STATUS 1997

FOR DEPARTMENT USE ONLY

For calendar year 1996 or other taxable year beginning _____, 1995, ending _____, 1996.

If you are not receiving your forms at the correct address or if you wish to advise us of a change in your mailing address, please check the box. Indicate your **correct mailing address** in the space below.

PLEASE TYPE OR PRINT	OHIO FRANCHISE TAX ID NO.	NAME	STATE OF INCORPORATION
	OHIO CHARTER OR LICENSE NO.	NUMBER AND STREET	
	FEDERAL EMPLOYER ID NO.	CITY, STATE, ZIP CODE	FEDERAL BUSINESS ACTIVITY CODE NO.

If the corporation was an S corporation for any portion of 1996, please file this notice by June 30, 1997. **Filing this notice does not constitute the filing of any tax return otherwise required by law.**

An Ohio resident's distributive share of income from an S corporation is subject to the Ohio individual income tax even if the S corporation does no business in Ohio. However, Ohio residents may claim a resident credit for income subjected to income tax in another state.

Any nonresident whose federal adjusted gross income includes a distributive share of income from an S corporation is subject to the Ohio individual income tax if the S corporation did business in Ohio or owned or used a part or all of its capital or property in Ohio for any portion of the period to which the distributive share relates.

An S corporation may each year file a master income tax return, Form IT-1040M, on behalf of and as agent for its electing nonresident shareholders having no Ohio-sourced income other than their distributive share of income from the S Corporation.

ALL S CORPORATIONS MUST FURNISH THE FOLLOWING INFORMATION

PLEASE TYPE OR PRINT

<p><input type="checkbox"/> Check the box if the below reported statutory agent and address is the same as was reported on the 1996 notice of S corporation status.</p> <p style="text-align: center;">Statutory Agent</p> <p style="text-align: center;">Name _____</p> <p>Street Address (Do Not Give Post Office Box Address) _____</p> <p>City _____ State _____ Zip _____</p>	<p><input type="checkbox"/> Check the box if all the below reported corporate officers are the same as was reported on the 1996 notice of S corporation status.</p> <p style="text-align: center;">Corporate Officers</p> <p>President _____</p> <p style="margin-left: 40px;">First Name Middle Initial Last Name</p> <p>Secretary _____</p> <p style="margin-left: 40px;">First Name Middle Initial Last Name</p> <p>Treasurer _____</p> <p style="margin-left: 40px;">First Name Middle Initial Last Name</p>
---	---

- Effective date of S election _____ Effective date of S termination (if applicable) _____
- Was this corporation a C corporation for any portion of 1996 prior to the effective date of an S election? Yes No. If yes, in addition to filing this notice the S corporation is subject to the 1997 franchise tax and must also file form FT-1120.
- During 1995 or 1996 did a C corporation that was subject to the Ohio franchise tax merge into the S corporation? Yes No. If yes, the S corporation may be subject to the franchise tax on the income of the merged C corporation. See page 3 of the 1997 Ohio Corporation Franchise Tax Report Instructions and the September 24, 1992 Franchise Tax Information Release, "Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation".
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No. If yes, the shareholders must report such changes to the Ohio Department of Taxation in the form of amended Ohio Individual Income Tax Returns.

Shareholder Information

Please provide the information requested on the back of this form for all resident and non-resident shareholders (including estates and trusts) who held stock in the corporation any time during the corporation's accounting period ending in 1996.

Shareholder Information

Provide the information below for each resident shareholder and each non-resident shareholder (including estates and trusts) who held stock in the S corporation any time during the S corporation's accounting period ending in 1996. If any shareholder is a trust or an estate, also list the name, social security number, and address of each beneficiary of the trust or estate. **Please type or print.**

Please check the box if this year's shareholder information either (i) contains names which were not shown on last year's notice or (ii) does not contain all the names which were shown on last year's notice.

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP (Note: The total %-ages must equal or exceed 100%)	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE	INDICATE THE AMOUNT BY WHICH THE SHAREHOLDERS ADJUSTED GROSS INCOME (FOR INDIVIDUALS) OR TAXABLE INCOME BEFORE DISTRIBUTION DEDUCTION, IF ANY (FOR TRUSTS AND ESTATES) WILL INCREASE OR DECREASE ON ACCOUNT OF THE SHAREHOLDER'S DISTRIBUTIVE SHARE OF INCOME FROM THE S CORPORATION FOR THE S CORPORATION'S ACCOUNTING PERIOD ENDING IN 1996*
1.				
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(attach additional sheet if necessary)

* If the S corporation will be filing the corresponding IRS form 1120S after June 30, 1997, the due date of this notice, please provide your reasonable and good faith estimate. You don't have to amend this notice if you provide reasonable and good faith estimates.

This notice must be signed by an officer or managing agent of the corporation

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by sections 3517.062, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly paid, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used.

DATE	SIGNATURE OF OFFICER OR MANAGING AGENT	TITLE
DATE	SIGNATURE OF PREPARER OTHER THAN TAXPAYER BASED ON ALL INFORMATION OF WHICH PREPARER HAS KNOWLEDGE	ADDRESS

OHIO

FT-1120-S NOTICE OF S CORPORATION STATUS **1998** FOR DEPARTMENT USE ONLY

For calendar year 1997 or other taxable year beginning _____, 1996, ending _____, 1997.

If you are not receiving your forms at the correct address or if you wish to advise us of a change in your mailing address, please check the box. Indicate your correct mailing address in the space below.

PLEASE TYPE OR PRINT	OHIO FRANCHISE TAX ID NO.	NAME	STATE OF INCORPORATION
	OHIO CHARTER OR LICENSE NO.	NUMBER AND STREET	
	FEDERAL EMPLOYER ID NO.	CITY, STATE, ZIP CODE	FEDERAL BUSINESS ACTIVITY CODE NO.

If the corporation was an **S corporation** for any portion of 1997 or if the corporation was a **qualified Subchapter S subsidiary** for any portion of 1997, please file this notice by June 30, 1998 (an S corporation and its qualified Subchapter S subsidiary must each file a notice). **Filing this notice does not constitute the filing of any tax return otherwise required by law.**

An Ohio resident's distributive share of income from an S corporation is subject to the Ohio individual income tax even if the S corporation does no business in Ohio. However, Ohio residents may claim a resident credit for income subjected to income tax in another state.

Any nonresident whose federal adjusted gross income includes a distributive share of income from an S corporation is subject to the Ohio individual income tax if the S corporation did business in Ohio, owned or used a part or all of its capital or property in Ohio, or otherwise had nexus with Ohio for any portion of the period to which the distributive share relates.

An S corporation may each year file a master income tax return, Form IT-1040M, on behalf of and as agent for its electing nonresident shareholders having no Ohio-sourced income other than their distributive share of income from the S corporation.

ALL S CORPORATIONS AND QUALIFIED SUBCHAPTER S SUBSIDIARIES MUST FURNISH THE FOLLOWING INFORMATION

PLEASE TYPE OR PRINT	<input type="checkbox"/> Check the box if the below reported statutory agent and address is the same as was reported on the 1997 notice of S corporation status.	<input type="checkbox"/> Check the box if all the below reported corporate officers are the same as was reported on the 1997 notice of S corporation status.
	Statutory Agent	Corporate Officers
	Name	President _____ First Name Middle Initial Last Name
	Street Address (Do Not Give Post Office Box Address)	Secretary _____ First Name Middle Initial Last Name
	City State Zip	Treasurer _____ First Name Middle Initial Last Name

- Effective date of S election _____ Effective date of S termination (if applicable) _____
- Was this corporation a C corporation other than a qualified Subchapter S subsidiary for any portion of 1997 prior to the effective date of an S election? Yes No. If yes, in addition to filing this notice the S corporation is subject to the 1998 franchise tax and must also file form FT-1120.
- During 1996 or 1997 did a C corporation that was subject to the Ohio franchise tax merge into the S corporation? Yes No. If yes, the S corporation may be subject to the 1998 franchise tax on the income of the merged C corporation. See page 5 of the 1998 Ohio Corporation Franchise Tax Report Instructions and the September 24, 1992 Franchise Tax Information Release, "Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation".
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No. If yes, the shareholders must report such changes to the Ohio Department of Taxation in the form of amended Ohio Individual Income Tax Returns.

Shareholder Information

Please provide the information requested on the back of this form for all resident and non-resident shareholders (including S corporations, estates and trusts) who held stock in the S corporation any time during the S corporation's accounting period ending in 1997.

Shareholder Information

If the reporting entity is an S corporation, provide the information below for each resident shareholder and each non-resident shareholder (including estates and trusts) who held stock in the S corporation any time during the S corporation's accounting period ending in 1997. If the reporting entity is a qualified Subchapter S subsidiary, list the name and federal identification number of the shareholder. S corporation. If any shareholder is a trust or an estate, also list the name, social security number, and address of each beneficiary of the trust or estate. Please type or print.

Please check the box if this year's shareholder information either (i) contains names which were not shown on last year's notice or (ii) does not contain all the names which were shown on last year's notice.

LAST NAME, FIRST NAME, MIDDLE INITIAL	% OF OWNERSHIP (Note: The total %-ages must equal or exceed 100%)	SOCIAL SECURITY OR IDENTIFYING NUMBER	COMPLETE HOME ADDRESS STREET, CITY, STATE AND ZIP CODE	FOR THE S CORPORATION'S ACCOUNTING PERIOD ENDING IN 1997 INDICATE THE AMOUNT BY WHICH THE SHAREHOLDER'S ADJUSTED GROSS INCOME (FOR INDIVIDUALS) OR TAXABLE INCOME BEFORE DISTRIBUTION DEDUCTION, IF ANY, (FOR TRUSTS AND ESTATES) WILL INCREASE OR DECREASE ON THE ACCOUNT OF THE SHAREHOLDER'S DISTRIBUTIVE SHARE OF INCOME FROM THE S CORPORATION.
1.				
2.				
3.				
4.				
5.				
6.				

(attach additional sheet if necessary)

* If the S corporation will be filing the corresponding IRS form 1120S after June 30, 1998, which is the due date of this notice, please provide your reasonable and good faith estimate on this notice. You don't have to amend this notice if you provide reasonable and good faith estimates.

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by sections 3517, 082, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used.

This notice must be signed by an officer or managing agent of the corporation

DATE SIGNATURE OF OFFICER OR MANAGING AGENT TITLE

DATE Signature of preparer other than taxpayer based on all information of which preparer has knowledge ADDRESS

IMPORTANT NOTICE:

For taxable years beginning after 1997 an S corporation is subject to the tax on pass-through entities enacted by Am. Sub. H.B. No. 215, 122nd General Assembly (Budget Bill) if any shareholder of the S corporation is a nonresident for any portion of the S corporation's taxable year and the S corporation does not file a composite Ohio income tax return on behalf of the nonresident shareholders. For a further explanation of the tax on pass-through entities see the Department's Instruction packet for Ohio Form IT-1040ES, "Ohio Estimated Tax Payment Coupon for Pass-through Entities and Trusts."

OHIO

FT-1120-S Notice of S Corporation Status 2000

For Department Use Only

Based upon calendar year 1999 or other taxable year beginning _____, 199_ and ending _____, 1999.

Please type or print

Ohio Franchise Tax ID No. <input type="text"/>	Federal Employer Identification No. <input type="text"/>
Ohio Charter or License No. <input type="text"/>	North American Industry Classification System (NAICS) Code <input type="text"/>
Corporation Name	
Address (Check box if you are not receiving forms at the proper mailing address.) <input type="checkbox"/>	
City	State Zip code

If the corporation was an S corporation for any portion of 1999 or if the corporation was a **qualified Subchapter S subsidiary** for any portion of 1999, please **file this notice by June 30, 2000** (an S corporation and its qualified Subchapter S subsidiary must **each** file a notice). **Filing this notice does not constitute the filing of any tax return otherwise required by law.**

Net Profit (Loss) per books
\$ _____

<input type="checkbox"/> Check the box if the below-reported statutory agent and address is the same as were reported on the 1999 notice of S corporation status. <div style="text-align: center; border: 1px solid black; padding: 2px;">Statutory Agent</div>	<input type="checkbox"/> Check the box if the names of all the below-reported corporate officers are the same as were reported on the 1999 notice of S corporation status. <div style="text-align: center; border: 1px solid black; padding: 2px;">Corporate Officers</div>																								
<table border="1" style="width: 100%;"> <tr> <th style="width: 50%;">Name</th> <th style="width: 12.5%;">First Name</th> <th style="width: 12.5%;">Middle Initial</th> <th style="width: 12.5%;">Last Name</th> </tr> <tr> <td colspan="4" style="text-align: center;">President</td> </tr> <tr> <td colspan="4" style="text-align: center;">Secretary</td> </tr> <tr> <td colspan="4" style="text-align: center;">Treasurer</td> </tr> <tr> <td>Street Address</td> <td>First Name</td> <td>Middle Initial</td> <td>Last Name</td> </tr> <tr> <td>City State Zip</td> <td>First Name</td> <td>Middle Initial</td> <td>Last Name</td> </tr> </table>	Name	First Name	Middle Initial	Last Name	President				Secretary				Treasurer				Street Address	First Name	Middle Initial	Last Name	City State Zip	First Name	Middle Initial	Last Name	
Name	First Name	Middle Initial	Last Name																						
President																									
Secretary																									
Treasurer																									
Street Address	First Name	Middle Initial	Last Name																						
City State Zip	First Name	Middle Initial	Last Name																						

General Information

An Ohio resident's distributive share of income from an S corporation is subject to the Ohio individual income tax even if the S corporation does no business in Ohio. However, Ohio residents may claim a resident credit for income subjected to income tax in another state.

Any nonresident whose federal adjusted gross income includes a distributive share of income directly or indirectly from an S corporation is subject to the Ohio individual income tax if either the S corporation or the S corporation's qualified subchapter S subsidiary did business in Ohio,

owned or used a part or all of its capital or property in Ohio, or otherwise had nexus with Ohio for any portion of the period to which the distributive share relates.

If an investor in the S corporation is not a resident of Ohio and if the S corporation has nexus with Ohio, the S corporation must each year file either (i) a composite income tax return, form IT-4708 and IT-4708ES, on behalf of and as agent for its electing nonresident shareholders or (ii) the pass-through entity and trust tax return, form IT-1140 and form IT-1140ES.

All S Corporations and Qualified Subchapter S Subsidiaries must furnish the following information:

- Effective date of S election or QSSS election: _____ Effective date of S termination (if applicable): _____
- Was this corporation a C corporation other than a qualified Subchapter S subsidiary for any portion of 1999? Yes No If yes, in addition to filing this notice the S corporation is subject to the 2000 franchise tax and must also file form FT-1120.
- During 1998 or 1999 did a C corporation that was subject to the Ohio franchise tax merge into the S corporation? Yes No If yes, the S corporation may be subject to the 2000 franchise tax on the income of the merged C corporation. See page 5 of the 2000 Ohio Corporation Franchise Tax Report Instructions and the September 24, 1992 Franchise Tax Information Release, *Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation.*
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No If yes, the shareholders or the S corporation must report such changes to the Ohio Department of Taxation in the form of amended Ohio income tax returns.

Shareholder Information

Please provide the information requested on the back of this form for all resident and nonresident shareholders (including corporations, estates and trusts) who held stock in the S corporation any time during the S corporation's accounting period ending in 1999.

(OVER)

Shareholder Information:

If the reporting entity is an S corporation, provide the information below for each resident shareholder and each nonresident shareholder (including estates and trusts) who held stock in the S corporation anytime during the S corporation's accounting period ending in 1999. If the reporting entity is a qualified Subchapter S subsidiary, list the name and federal identification number of the parent S corporation. If any shareholder is an estate or trust other than an electing small business trust, also list the name and social security number of each beneficiary of the estate or trust. **Please type or print.**

Please check the box if this year's shareholder information either (i) contains names which were not shown on last year's notice or (ii) does not contain all the names which were shown on last year's notice.

Last Name, First Name, Middle Initial	Social Security or Identifying Number
1.	
2.	
3.	
4.	
5.	
6.	

(Attach additional sheet if necessary.)

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by sections 3517.082, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly paid, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used.

This notice must be signed by an officer or managing agent of the corporation.



 Date Signature of Officer or Managing Agent Title



 Date Signature of preparer if other than taxpayer based on all information of which preparer has knowledge. Address

Important Notice: For taxable years beginning after 1997 Am. Sub. H.B. No. 215, 122nd General Assembly (Budget Bill), imposes a "pass-through entity" tax on each S corporation if (i) either the S corporation or the S corporation's qualified Subchapter S subsidiary does business in Ohio, owns or uses a part or all of its capital or property in Ohio, or otherwise has nexus with Ohio for any portion of the S corporation's taxable year, (ii) any shareholder of the S corporation is a nonresident for any portion of the S corporation's taxable year, and (iii) the S corporation does not file a composite Ohio income tax return (form IT-4708) on behalf of all the nonresident shareholders. For a further explanation of the tax on pass-through entities see the Department's instruction packet for Ohio form IT-1140, "Pass-through Entity and Trust Tax Return."

The Department's internet web address is www.state.oh.us/tax/.

OHIO

FT-1120-S Notice of S Corporation Status 2001

For Department Use Only

Based upon calendar year 2000 or other taxable year beginning _____, _____ and ending _____, 2000.

Please type or print

Ohio Franchise Tax ID No.	Federal Employer Identification No.
Ohio Charter or License No.	North American Industry Classification System (NAICS) Code
Corporation Name	
Address (Check box if you are not receiving forms at the proper mailing address.) <input type="checkbox"/>	
City	State Zip code

If the corporation was an **S corporation** having an accounting period ending in 2000 **or** if the corporation was a **qualified Subchapter S subsidiary** having an accounting period ending in 2000, **please file this notice by June 30, 2001** (an S corporation and its qualified Subchapter S subsidiary must **each** file a notice). **Filing this notice does not constitute the filing of any tax return otherwise required by law.**

Net Profit (Loss) per books
\$ _____

<input type="checkbox"/> Check the box if the below-reported statutory agent and address are the same as were reported on the 2000 notice of S corporation status.	<input type="checkbox"/> Check the box if the names of all the below-reported corporate officers are the same as were reported on the 2000 notice of S corporation status.
Statutory Agent	Corporate Officers
	President
Name	First Name Middle Initial Last Name
	Secretary
Street Address	First Name Middle Initial Last Name
	Treasurer
City State Zip	First Name Middle Initial Last Name

General Information

An Ohio resident's distributive share of income from an S corporation is subject to the Ohio individual income tax even if the S corporation does no business in Ohio. However, Ohio residents may claim a resident credit for income subjected to income tax in another state.

ownership interest did business in Ohio, owned or used a part or all of its capital or property in Ohio, or otherwise had nexus with Ohio under the Constitution of the United States for any portion of the period to which the distributive share relates.

Any nonresident whose federal adjusted gross income includes a distributive share of income directly or indirectly from an S corporation is subject to the Ohio individual income tax if the S corporation, the S corporation's qualified subchapter S subsidiary ("QSSS"), a disregarded entity in which the S corporation or QSSS has an ownership interest, or a pass-through entity in which the S corporation or QSSS has an

If an investor in the S corporation is not a resident of Ohio and if the S corporation has nexus with Ohio, the S corporation must each year file either (i) a composite income tax return, form IT-4708 and IT-4708ES, on behalf of and as agent for its electing nonresident shareholders or (ii) the pass-through entity and trust tax return, form IT-1140 and form IT-1140ES.

All S Corporations and Qualified Subchapter S Subsidiaries must furnish the following information:

- During any portion of calendar year 2000 or other taxable year ending in 2000 was any shareholder/stockholder an electing small business trust (ESBT)? Yes No.
- Effective date of S election or QSSS election: _____ Effective date of S termination (if applicable): _____
- Was this corporation a C corporation other than a qualified Subchapter S subsidiary for any portion of 2000? Yes No If yes, in addition to filing this notice the S corporation is subject to the 2001 franchise tax and must also file form FT-1120.
- During 1999 or 2000 did a C corporation that was subject to the Ohio franchise tax merge into the S corporation? Yes No If yes, the S corporation may be subject to the 2001 franchise tax on the income of the merged C corporation. See page 5 of the 2001 Ohio Corporation Franchise Tax Report Instructions and the September 24, 1992 Franchise Tax Information Release, *Application of Ohio Revised Code Section 5733.053 (Transferor Statute) to the Merger of a C Corporation into an S Corporation*.
- Has the corporation or the Internal Revenue Service redetermined the shareholders' share of S corporation income or deductions for any prior year(s) which have not previously been reported to Ohio? Yes No If yes, the shareholders or the S corporation must report such changes to the Ohio Department of Taxation in the form of amended Ohio income tax returns.

(OVER)

Shareholder Information:

If the reporting entity is an S corporation, provide the information below for each resident shareholder and each nonresident shareholder (including estates and trusts) who held stock in the S corporation anytime during the S corporation's accounting period ending in 2000. If the reporting entity is a qualified Subchapter S subsidiary, list the name and federal identification number of the parent S corporation. If any shareholder is an estate or trust other than an employee stock option plan, also list the name, social security number and address of each beneficiary of the estate or trust. **Please type or print.**

Please check the box if this year's shareholder information either (i) contains names which were not shown on last year's notice or (ii) does not contain all the names which were shown on last year's notice.

1.	Last Name, First Name, Middle Initial	Street Address
	Social Security or Identifying Number	City, State, Zip
2.	Last Name, First Name, Middle Initial	Street Address
	Social Security or Identifying Number	City, State, Zip
3.	Last Name, First Name, Middle Initial	Street Address
	Social Security or Identifying Number	City, State, Zip

(Attach additional sheet if necessary.)

I declare under penalties of perjury that this notice (including any accompanying schedule or statement) has been examined by me and to the best of my knowledge and belief is a true, correct and complete notice and that this corporation has not unlawfully, during the preceding year, except as permitted by sections 3517.082, 3599.03, and 3599.031 of the Ohio Revised Code, directly or indirectly paid, used or offered, consented, or agreed to pay or use any of its money or property for or in aid of or opposition to any political party, any candidate for election or nomination to public office, or any political action committee or organization that supports or opposes any such candidate or in any manner used any of its money or property for any partisan political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used.

This notice must be signed by an officer or managing agent of the corporation.

▶

Date	Signature of Officer or Managing Agent	Title

▶

Date	Signature of preparer if other than taxpayer based on all information of which preparer has knowledge.	Address

Important Notice: For taxable years beginning after 1997 Am. Sub. H.B. No. 215, 122nd General Assembly (Budget Bill), imposes a "pass-through entity" tax on each S corporation if (i) either the S corporation or the S corporation's qualified Subchapter S subsidiary does business in Ohio, owns or uses a part or all of its capital or property in Ohio, or otherwise has nexus with Ohio under the Constitution of the United States for any portion of the S corporation's taxable year, (ii) any shareholder of or any beneficiary or grantor of an ESBT investing in the S corporation is a nonresident for any portion of the S corporation's taxable year, and (iii) the S corporation does not file a composite Ohio income tax return (form IT-4708) on behalf of all the nonresident shareholders. For a further explanation of the tax on pass-through entities see the Department's instructions for Ohio form IT-1140, "Pass-through Entity and Trust Tax Return."

The Department's internet web address is www.state.oh.us/tax/.