

IN THE SUPREME COURT OF OHIO

| | | |
|----------------------------|---|--------------------------------|
| JAMES B. & TINA D. RENACCI |) | CASE NO. 2014-1893 |
| |) | |
| Appellants, |) | |
| |) | |
| v. |) | APPEAL FROM OHIO BOARD OF |
| |) | TAX APPEALS CASE NO. 2012-1850 |
| |) | |
| JOSEPH W. TESTA, |) | |
| TAX COMMISSIONER OF OHIO |) | |
| |) | |
| Appellee. |) | |

**MOTION OF APPELLANTS, JAMES B. & TINA D. RENACCI
FOR ORAL ARGUMENT BEFORE THE FULL COURT**

Appellants, James B. & Tina D. Renacci (the “Renaccis”) hereby move, pursuant to S.Ct.Prac.R. 17.07(A)(1), to schedule oral argument of this appeal before this full Court. Under S.Ct.Prac.R. 17.07(A)(1), appeals from the Board of Tax Appeals (“BTA”) are “...referred to a regular or special master commissioner for oral argument unless the parties waive the argument or the Supreme Court, sua sponte or upon motion, decides to hear the argument itself.”¹ There are many special circumstances in this case, which include: multiple inconsistent legal positions taken by the Appellee, Joseph W. Testa, Tax Commissioner of Ohio (“Tax Commissioner”); the Tax Commissioner’s far-reaching assignment of error which claims that Ohio taxpayers do not have the right to appeal decisions on income tax penalty refund claims, even when the Tax Commissioner agrees a refund claim is allowed; and substantial due process issues which could not be heard by

¹ S.Ct.Prac.R. 17.07(A)(1).

the BTA due to its jurisdictional limitations. Therefore, to facilitate the full and open dialogue with the party representatives, it is critical for the full Court to hear and participate in the oral argument.

Under the very unique circumstances of this case, the central issue is whether a taxpayer should be penalized even though he voluntarily, timely, and fully disclosed his position in following a longstanding tax planning practice publicly declared acceptable by the Tax Commissioner and his representatives, which was then prospectively changed by the Tax Commissioner without any corresponding change in the law. The Tax Commissioner publically took inconsistent positions concerning whether income from grantor trusts making a small business election (“ESBT”) was taxable to the grantor, yet assessed a penalty upon the Renaccis for publically following the Tax Commissioner’s original position. Making such a sudden change in policy without a corresponding change in law undermines the reliability of the office of Tax Commissioner and should be of concern to this full Court.

Additionally, the credibility of the Ohio Department of Taxation is called into question by the Tax Commissioner taking inconsistent positions on a number of issues. First, the Tax Commissioner conducted his audit of the Renaccis based upon their voluntary and timely disclosure of ESBT income through filing Notices of S Corporation Status specifically designed for disclosure of this income. Now, the Tax Commissioner claims that the Renaccis’ disclosure was inadequate. Second, in assessing tax, interest, and a penalty on the Renaccis for ESBT income, the Tax Commissioner concluded that the Renaccis did not commit fraud and did not issue a fraud penalty. The Tax Commissioner now inexplicably and contradictorily alleges fraud in his Second Merit Brief. Third, the Tax Commissioner previously agreed that the Renaccis had a right to pursue a penalty refund claim, but now denies it. Although the Tax Commissioner’s

representatives, including the attorney representing the Tax Commissioner in this appeal (Bart Hubbard), agreed that the Renaccis could pursue a refund claim if they dismissed their prior appeal of an assessment and paid the relevant tax, interest, and penalties, after the Renaccis relied upon such agreement the Tax Commissioner now takes the contrary position that taxpayers do not have a right to appeal decisions on income tax penalty refund claims. The BTA properly rejected this jurisdictional argument raised by the Tax Commissioner for the first time on appeal. The Tax Commissioner's assertion of this argument as an assignment of error before this Court could have far-reaching consequences for Ohio taxpayers if the Tax Commissioner applies this latest change in his opinion to the treatment of income tax penalty refund claims going forward.

Finally, this case presents significant due process issues which could not be heard by the BTA since it does not have jurisdiction over constitutional claims by taxpayers. Under R.C. 5747.13(E) and (F), Ohio taxpayers have the right to appeal tax decisions without having paid the assessed tax. Nevertheless, in this case, the Tax Commissioner's offer of partial penalty abatement would have required the Renaccis to very quickly pay tax, interest and part of the penalty, while also conditioning the partial penalty abatement on foregoing appeal rights concerning the underlying tax liability. Aside from being a totally arbitrary exercise of discretion in relation to other circumstances and taxpayers, this constituted a taking without the right to due process.

Due to the unique facts of this case and the Tax Commissioner's inconsistent policy changes, as well as attempts to deny taxpayers' penalty refund rights and due process of law, this full Court should hear the oral argument in this matter of substantial public interest, rather than to assign it to a master commissioner. The parties need to be fully accountable to this Court to

address any clarification concerning the relevant facts and the changed positions taken by the Tax Commissioner. The Renaccis respectfully move this Court to schedule the oral argument for full Court review at its earliest convenience.

/s/ Matthew R. Duncan

Steven A. Dimengo (0037194)
Matthew R. Duncan (0076420)
Buckingham, Doolittle & Burroughs, LLC
3800 Embassy Parkway, Suite 300
Akron, OH 44333
(330) 376-5300 (Telephone)
(330) 252-5523 (Facsimile)
sdimengo@bdblaw.com
mduncan@bdblaw.com

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion of Appellants, James B. & Tina D. Renacci for Oral Argument Before the Full Court was served by electronic mail to barton.hubbard@ohioattorneygeneral.gov on the 18th day of May, 2015 and by Ordinary U.S. Mail, postage prepaid, on the 18th 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

*One of the Attorneys for Appellants,
James B. & Tina D. Renacci*