

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT TAX COMMISSIONER

Under the Ohio income tax refund statute, R.C. 5747.11, refund claims are limited to *illegal, erroneous, or excessive* assessments of tax, rather than *lawfully imposed* assessments of *penalties* thereon.

A. Introduction

The BTA's grounds for affirmance of the Commissioner, as set forth in its Decision and Order, and as supported by the Commissioner's Propositions of Law Nos. 1 and 2 in his opening merit brief ("TC. Br."), provide ample reasons for this Court to uphold the BTA's affirmance of the Commissioner's final determination denying the Renaccis' request for penalty remission. See TC. Br. at 30-35. Thus, this Court need not address this jurisdictional issue. See, *Hafiz v. Levin*, 120 Ohio St.3d 447, 2008-Ohio-6788, ¶ 15, fn. 1 (having determined that the taxpayer's challenge based on its reading of a tax statute was substantively erroneous, the Court declined to consider whether the challenge failed jurisdictionally). The BTA's decision upholding the Commissioner's denial of penalty remission may be properly upheld on this independent jurisdictional ground.

B. Under R.C. 5747.11's plain, unambiguous language, as confirmed by a uniform body of decisional law, an Ohio income tax refund application is not an appropriate vehicle for taxpayer's to request penalty abatement.

As the Commissioner set forth under Proposition of Law No. 3 of his initial merit brief, under its plain meaning, the Ohio income tax refund statute, R.C. 5747.11, does *not* afford taxpayers with the right to penalty remission; instead, taxpayers must timely request penalty remission pursuant to petitions for reassessment, under R.C. 5747.13. See the Commissioner's initial merit brief ("T.C. Br.") at T.C. Br. 31-35.

The Renaccis' use of the Ohio income tax refund statutes to seek penalty remission on the basis of an alleged "abuse of discretion" by the Commissioner is a "novel approach," to say the least. It is entirely unprecedented in the history of Ohio cases presented to the Ohio courts. See T.C. Br. 32 (noting that "in the entire history of the Ohio tax law, the undersigned counsel could find *no* decisions of this Court that have involved a challenge to the Commissioner's denial of tax penalty abatement regarding any tax administered by the Commissioner in which the requesting taxpayer had sought such relief pursuant to a tax refund claim").

In their response brief (the "Third Brief"), the Renaccis do not cite *any* case law in support of their claim that the income tax refund statute -- or, for that matter, any other Ohio tax refund statute -- constitutes a proper vehicle for requesting penalty abatement. Nor do the Renaccis attempt to discuss any of the uniform body of decisions of the Board of Tax Appeals holding that Ohio's tax refund statutes do not provide any such relief. Despite the Commissioner's discussion and reliance on the BTA's uniform body of previous decisions so holding (see T.C. Br. 32-33), the Renaccis' brief is completely silent. The Renaccis' fail to refute any of the manifold reasons establishing why the income tax refund statute constitutes an "improper vehicle" for a taxpayer to seek penalty remission.

First, by its express terms, R.C. 5747.11 limits the relief afforded to an income tax refund claimant to refunds of income *taxes*, and not refunds of penalties thereon. See, R.C. 5747.11(A) (providing the Commissioner the authority to grant refunds "with respect to any *tax* imposed under R.C. 5733.41, **5747.02**, or 5747.41, or Chapter 5748 of the Revised Code").¹ The

¹ In fact, this Court expressly has read identical language in the Ohio corporate franchise tax refund statute, R.C. 5733.12(B), to limit the relief afforded to corporate franchise tax assessees under that refund statute to "taxes *** paid on any illegal, erroneous or excessive assessment." (Emphasis added.) *Internatl. Business Machines Corp. v. Zaino*, 94 Ohio St.3d 152, 155-156 (1994) (quoting and amplifying *Lancaster Colony Corp. v. Lindley*, 61 Ohio St.2d 268, 271).

Commissioner's remission/refund of the late filing *penalty* does not constitute a refund "with respect to any **tax** imposed *** under R.C. 5747.02 ***." The income *tax* levied pursuant to **R.C. 5747.02** is entirely distinct from the late filing **penalty** that the Commissioner imposed here pursuant to **R.C. 5747.15(A)(2)**. In their response brief, the Renaccis simply confuse these fundamentally different terms and statutes by improperly considering the Commissioner's imposition of the late filing penalty under R.C. 5747.15(A)(2) to constitute the imposition of the income tax levy itself, pursuant to R.C. 5747.02.

Second and independently, by its express terms, R.C. 5747.11 limits the relief afforded pursuant to an income tax refund claim to amounts that were "paid *illegally or erroneously*," or that were "paid on an *illegal, erroneous, or excessive* assessment." See R.C. 5747.11(A)(2) and (3), respectively. Here, the Commissioner's assessment of penalties in the amount of twice the applicable interest charged under R.C. 5747.08(G) did not exceed the amount of statutory penalties that the Commissioner may *lawfully* impose pursuant to R.C. 5747.15(A)(2), which provides that: "[i]f a taxpayer fails to pay any amount of tax required to be paid under section 5733.41 or Chapters 5747 or 5748 of the Revised Code *** by the dates prescribed for payment, a penalty may be imposed not exceeding twice the applicable interest charged under division (G) of section 5747.08 of the Revised Code for the delinquent payment." (Underlining added.)

In the exercise of his lawful discretion, as conferred by the General Assembly, the Commissioner followed the statutory directive and parameters prescribed by the General Assembly in R.C. 5747.15(A)(2). The Commissioner did not impose a penalty "exceeding twice the applicable interest charged under division (G) of Section 5747.08 of the Revised Code for the delinquent payments." Specifically, the Commissioner assessed late filing penalties in the

amount of \$293,876, which is twice the amount of the Commissioner's pre-assessment interest of \$146,938.

For this very reason, as noted in the Commissioner's opening brief, in *Stevens v. Tracy*, BTA No. 1994-H-116 (October 20, 1995), unreported, the BTA held that an application for sales tax refund was an improper vehicle for granting penalty remission. The BTA held that "the fact the Tax Commissioner had authority to remit the penalty under R.C. 5739.133 does not make its [the appellant taxpayer's] assessment "illegal or erroneous" or give the Tax Commissioner authority to consider remission (per R.C. 5739.133 or any other authority) under R.C. 5739.07 [the sales tax refund statute]." *Stevens* at *1- 2 (citing *Brown Derby, Inc. v. Lindley*), BTA Case Nos. 77-E-12 to 77-E-21, inclusive (April 4, 1978), unreported, and *The Andersons, A Limited Partnership v. Limbach*, BTA Case No. 89-J-549 (January 4, 1991), unreported.

Third, the General Assembly has provided a specific means by which income taxpayers may request penalty remission: pursuant to their petitions for reassessment, under R.C. 5747.13, and satisfy the requirements for perfecting the petition for reassessment as set forth therein.

Finally, in departing from its own uniform body of decisional law, in its decision below, the BTA erred in holding that R.C. 5703.60(A)(3) somehow provided a statutory basis on which Ohio individual income taxpayers may seek remission of income tax penalties pursuant to an income tax refund claim under R.C. 5747.11. See *BTA Decision and Order* at unnumbered page 3.

Contrary to the BTA's apparent misunderstanding, R.C. 5703.60(A)(3) does not expressly or impliedly set forth any right to remission of lawfully assessed income tax penalties pursuant to an Ohio income tax refund claim. Instead, R.C. 5703.60(A)(3) provides, in part, that the Commissioner's issuance of a final determination on a taxpayer's petition for reassessment

(if not appealed timely to the BTA), shall not have res judicata or collateral estoppel effect in the Commissioner's subsequent consideration of tax refund claims. Notably, the Renaccis' reply brief provides no case law or other analysis in support of the BTA's bare assertion that R.C. 5703.60(A)(3) somehow confers taxpayers with the right to seek penalty abatement pursuant to the Ohio income tax refund statute.

In this case, the Commissioner has not relied on the doctrines of res judicata or collateral estoppel as a jurisdictional basis for dismissing or denying the Renaccis' request for penalty remission, so that R.C. 5703.60(A)(3) is inapplicable. Instead, as noted, the Renacci's request for remission of the assessed income tax penalties is jurisdictionally barred because the General Assembly has not provided for remission of lawfully assessed penalties pursuant to an income tax refund claim under R.C. 5747.11.

C. Subject matter jurisdictional requirements may not be waived.

It is axiomatic that subject matter jurisdictional requirements may not be waived. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544 (1997), citing *State v. Wilson*, 73 Ohio St.3d 40, 46 (1995), and *State ex rel. Wright v. Ohio Adult Parole Auth.* 75 Ohio St.3d 82, 84 (1996). In fact, as a creatures of statute, the Tax Commissioner and BTA have only such jurisdiction and power as conferred upon them by the General Assembly, which does not include the power to waive jurisdictional requirements. *Painesville v. Lake County Budget Com.*, 56 Ohio St. 2d 282 (1978), (subject matter jurisdiction for the County Board of Revision to hear an appeal under R.C. 5747.55 is not subject to waiver by the Board of Revision; rather, statutory requirements to confer jurisdiction must be met); *French v. Limbach*, 59 Ohio St. 3d 153 (1991) (the BTA was created by statute and has only such jurisdiction and power to hear an appeal as conferred upon it by the General Assembly, citing to R.C. 5703.02); and R.C. 5703.01

(parallel statute to R.C. 5703.02 applicable to the Commissioner). In their response brief (the Third Brief), the Renaccis simply ignore this established case law precedent.

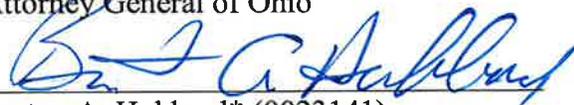
To summarize, under the Ohio income tax refund statute, R.C. 5747.11, refund claims are limited to illegal, erroneous, or excessive assessments of tax, rather than lawfully imposed assessments of penalties thereon. Further, under established case law, the Commissioner may not waive that jurisdictional limitation, as the Renaccis have urged. Accordingly, the Court may properly uphold the BTA's decision affirming the Commissioner's denial of penalty abatement on this alternative and independent jurisdictional ground.

III. CONCLUSION

For the above reasons and those set forth in the Commissioner's initial merit brief, the BTA's decision and order upholding the Commissioner's final determination denying the Renaccis' request for abatement of the R.C. 5747.15(A)(2) failure-to-timely-pay penalty is reasonable and lawful and should be affirmed by the Court.

Respectfully submitted,

Michael DeWine
Attorney General of Ohio



Barton A. Hubbard* (0023141)
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215

Counsel for Appellee/Cross-Appellant
Joseph W. Testa, Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Tax Commissioner's Reply Brief (the Fourth Brief) was served upon the following by U.S. regular mail and email transmission on this 1st day of June, 2015:

Steven A. Dimengo, Esq.
Matthew Duncan, Esq.
Buckingham, Doolittle & Burroughs LLC
3800 Embassy Parkway, Suite 300
Akron, Ohio 44333

*Counsel for Appellants
James and Tina Renacci*


Barton A. Hubbard (0023141)