

**OHIO BOARD OF TAX APPEALS**

William F. Lowery,	)	CASE NO. 2004-J-295
	)	
Appellant,	)	(PERSONAL INCOME TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
William W. Wilkins,	)	
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellant	- William F. Lowery, pro se 3277 Kirkwood Road Columbus, Ohio 43227
Notice of Appeal Filed By <sup>1</sup>	- Jerry Arthur Jewett 317 South Park Avenue Suite D P.O. Box 1085 Fremont, Ohio 43420
For the Appellee	- Jim Petro Attorney General of Ohio Barton A. Hubbard Assistant Attorney General Taxation Section State Office Tower 30 East Broad Street – 16 <sup>th</sup> Floor Columbus, Ohio 43215-3428

Entered March 11, 2005

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

The Board of Tax Appeals is considering this matter pursuant to a notice of appeal filed by William F. Lowery (“appellant”). Appellant has appealed from a final determination of the Tax Commissioner that assessed personal income

<sup>1</sup> The board notes that subsequent to the filing of the notice of appeal, Mr. Jewett was suspended from the practice of law in Ohio.

tax against the appellant for tax year 2001. The notice of appeal and final determination are incorporated herein by reference.

The matter has been submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified by the Tax Commissioner, the record of the hearing in this matter, and stipulated information from *Russell v. Zaino* (July 23, 2004), BTA No. 2003-G-810, unreported.<sup>2</sup>

The appellant submitted his 2001 Ohio income tax return showing Ohio adjusted gross income and Ohio income tax due as zero, with a refund requested for all Ohio income tax withheld by his employer, State of Ohio Secretary of State, even though his attached W-2 form showed substantial wages. Based upon the W-2 form, the commissioner calculated the income tax due and added a \$500 frivolous return penalty. The frivolous return penalty was netted against the refund appellant would have been due based upon the commissioner's calculation. This resulted in a net penalty owed of \$424.

In the notice of appeal the appellant specified forty-one errors which are essentially the same errors specified and addressed in *McCracken v. Zaino* (July 9, 2004), BTA No. 2003-A-1756, unreported. The board will not fully reiterate its holding in this case, except to say that our ruling on each of the identical issues in this appeal remains the same.

The appellant has argued that the state has no authority to impose an income tax on the appellant because he has no federal adjusted gross income.

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<sup>2</sup> The parties stipulated that the testimony of James Bauman, who is in charge of the zero-return filing program for the Ohio Department of Taxation, and the documents he produced in the earlier case be part of the record in this appeal. Although the parties were uncertain which case contained Mr. Bauman's testimony, since he testified in *Russell v. Zaino*, supra, the record in that case has been included with the record herein.

However, appellant's W-2 form clearly showed income in the form of wages. We refer to our decision in *Welch v. Zaino* (July 20, 2001), BTA No. 2000-T-960, unreported, wherein we responded to claims similar to those now advanced by appellant:

“Section 3, Article XII, Ohio Constitution, provides authority for the state of Ohio to tax the income of individuals. The constitutionality of this tax was upheld in *Chope v. Collins* (1976), 48 Ohio St.2d 297, where the Supreme Court held that Ohio may tax the annual income of persons receiving rights, protections, benefits and privileges under Ohio law. The term ‘income’ has itself been defined by the Court in *Angeli v. Toledo* (1950), 153 Ohio St. 179:

“‘In its ordinary and popular meaning, “income” is the amount of actual wealth which comes to a person during a given time. An income tax is one levied on the income from property or an occupation. It is a direct tax on the thing called income.’ *Id.* at 183, quoting from 1 *Cooley on Taxation* (4 Ed.), 138 Section 49.

“Ohio’s personal income tax provisions are directly based upon the federal code. R.C. 5747.01 provides:

“‘Except as otherwise provided or clearly appearing from the context, any term used in this chapter has the same meaning as used in a comparable context in the Internal Revenue Code, and all other statutes of the United States relating to federal income taxes.’

“An Ohio taxpayer’s income tax liability is measured on the basis of the taxpayer’s adjusted gross income. *Derry v. Lindley* (1979), 57 Ohio St.2d 5. While the term ‘income’ is not separately defined by the Revised Code, R.C. 5747.01(A) defines the terms ‘adjusted gross income’ [and ‘Ohio adjusted gross income’] as having the same meaning as when used in the Internal Revenue Code, subject to certain adjustments not in issue in this matter. ‘Adjusted gross income,’ as used in the Internal Revenue Code,

refers to ‘gross income’ modified by certain deductions not here in issue. 26 U.S.C. 62(a).

“The Internal Revenue Code defines ‘gross income’ at 26 U.S.C. 61(a):

“Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

“(1) *Compensation for services, \*\*\** (Emphasis added.)” Id. at 4-5.

See, also, *McCracken*, supra; *Hampton v. Zaino* (Oct. 24, 2003), BTA No. 2003-A-626, unreported; *Welch v. Zaino* (May 23, 2003), BTA No. 2002-A-1204, unreported; *Tyler v. Zaino* (Apr. 25, 2003), BTA No. 2002-V-1310, unreported; *Persun v. Zaino* (Feb. 14, 2003), BTA No. 2002-R-1080, unreported. Thus, we find that the Tax Commissioner properly had the authority to use the figures listed on appellant’s federal withholding statements as the basis for determining his federal and Ohio adjusted gross income.

In considering appellant’s argument, we are mindful of the Supreme Court’s admonition in *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 124:

“Absent a demonstration that the commissioner’s findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner’s determination when no competent and probative evidence is presented to show that the commissioner’s determination is factually incorrect.”

It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption of validity which attaches to the

commissioner's findings, and establish a clear right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. The taxpayer is assigned the burden of showing the manner in which and the extent to which the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. The appellant has failed to submit evidence showing error in the commissioner's determination.

The appellant has also challenged the constitutionality of Ohio's income tax. However, this board is an administrative agency, a creature of statute, and is without jurisdiction to determine the constitutional validity of a statute. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 118. Accordingly, we decline to address these arguments.

Based upon the foregoing, we find appellant has failed to prove by competent and probative evidence that the Tax Commissioner's final determination is in error. As a result, it is the decision and order of the Board of Tax Appeals that the Tax Commissioner's final determination must be, and hereby is, affirmed.

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