

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard C. Hvizdak, :  
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 Petitioner :  
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 v. :  
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 Commonwealth of Pennsylvania, : No. 739 F.R. 2006  
 Respondent : Argued: April 21, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: June 8, 2010

Richard C. Hvizdak (Taxpayer) has filed exceptions to this Court’s Order dated November 19, 2009, which affirmed as modified the order of the Board of Finance and Revenue and reduced Taxpayer’s tax liability for 2002 to \$777,847.00. This Court also reduced the underpayment penalty to five percent. This Court affirmed as modified the assessment of appropriate interest under the Tax Reform Code (Code)<sup>1</sup> and the penalty for underpayment of estimated tax based on the amount of \$777,847.00.

Taxpayer asserts that this Court erroneously concluded that he was not entitled to deduct his loss from Brown Fox Partners Fund LLC (Brown Fox) on his 2002 Personal Income Tax Return. Taxpayer also asserts that assuming *arguendo* that the

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<sup>1</sup> Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §§7101 – 10004.

loss from Brown Fox is disallowed, this Court erroneously concluded that the assessment of a five percent underpayment penalty is appropriate in light of the fact that all tax was paid prior to the filing of Taxpayer's refund claim and Taxpayer relied on professional advice concerning his investment in Brown Fox.

With respect to whether Taxpayer could deduct his loss from Brown Fox, this issue was ably and thoroughly disposed of by the panel in Hvizdak v. Commonwealth of Pennsylvania, 985 A.2d 984 (Pa. Cmwlth. 2009) which neither misapplied nor misconstrued the law.

With respect to the penalty assessment, Taxpayer asserts that the five percent penalty should be set aside because he filed his tax return in a manner consistent with the advice provided by a national accounting firm and was consistent with the inclusion of income from the investment at issue in the tax returns of prior years. Because of his reliance on this advice and because of the manner in which he filed his prior returns, Taxpayer asserts that he did not act negligently or with intentional disregard of the rules and all penalties should be set aside.

Section 352(b)(1) of the Code, 72 P.S. §7352(b)(1),<sup>2</sup> provides: "If any part of any underpayment of any tax imposed . . . is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, there shall be added to the tax an amount equal to five per cent of the underpayment."

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<sup>2</sup>

This Section was added by the Act of August 31, 1971, P.L. 362.

In Ignatz v. Commonwealth, 849 A.2d 308 (Pa. Cmwlth. 2004), this Court declined to impose a penalty when a taxpayer acted in good faith and without negligence or intent to defraud.

Absent any evidence that Taxpayer acted negligently or with intentional disregard of the rules or with intent to defraud, the penalty is set aside.

Accordingly, this Court overrules the exception with respect to the imposition of tax but sustains the exception with respect to the imposition to penalties.

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BERNARD L. McGINLEY, Judge

Judge Brobson did not participate in the decision in this case.

