

IN THE MAGISTRATE DIVISION
OF THE OREGON TAX COURT
Income Tax

WILLIAM J. AND DEBRA R. FIGARA,)	
)	
Plaintiffs,)	No. 001055C (Control)
)	
v.)	
)	
DEPARTMENT OF REVENUE, STATE OF OREGON,)	
)	
Defendant.)	
<hr style="width: 30%; margin-left: 0;"/>		
WILLIAM J. FIGARA,)	
)	
Plaintiff,)	No. 001056C
)	
v.)	
)	
DEPARTMENT OF REVENUE, STATE OF OREGON,)	
)	
Defendant.)	DECISION OF DISMISSAL

This matter is before the court on defendant's Motion to Dismiss the Complaint, which requests a waiver of penalties imposed by the Department of Revenue (the department) under ORS 305.992 for tax years 1995, 1996, 1997, 1998 and 1999, for lack of jurisdiction. The motion is included in defendant's Answer, and was addressed during the November 30, 2000, case management conference. Plaintiffs were represented by Mr. Ronald D. Murray, Attorney at Law. Defendant appeared through Mr. Mike Halter, an auditor with the department.

The basis for the motion is that a penalty waiver request may only be considered by the department. Mr. Halter points out in the Answer that such a request is considered first by a Revenue Agent, whose determination may be appealed to the department's Conference section. At the hearing Mr. Halter stated that there was no deadline for making such a request. Plaintiffs' representative wanted that statement reflected in the court's written Decision, since at the time of the hearing the 90-day statutory deadline for appealing an assessment had lapsed.

ORS 305.992 provides:

“(1) If any returns required to be filed under ORS chapter 118, 314, 316, 317, 318, 321 or 323 or under a local tax administered by the Department of Revenue under ORS 305.620 are not filed for three consecutive years by the due date (including extensions) of the return required for the third consecutive year, there shall be a penalty for each year of 100 percent of the tax liability determined after credits and prepayments for each such year.

“(2) The penalty imposed under this section is in addition to any other penalty imposed by law. However, the total amount of penalties imposed for any taxable year under this section, ORS 305.265 (13), 314.400, 323.403 or 323.585 shall not exceed 100 percent of the tax liability.”

The penalty in this case was imposed by the department because plaintiffs failed to file state tax file returns for three consecutive years. This fact is not in dispute. However, plaintiffs would nonetheless like the penalty waived, in whole or in part.

ORS 305.145(3) specifically provides for penalty waivers, vesting such authority with the department. The statute provides:

“(3) The Department of Revenue may, in its discretion, upon good and sufficient cause, according to and consistent with its rules and regulations, upon making a record of its reason therefor, waive, reduce or compromise any tax balance of \$50 or less or any part or all of the penalties and interest provided by the laws of the State of Oregon which are collected by the Department of Revenue.”

This court has previously held that penalty waiver requests can only be considered by the department and that there is no appeal of the department's decision. *See Pelett v. Dept. of Rev.*, 11 OTR 364 (1990). The *Pelett* decision was based on ORS 305.560(1)(a), which sets out the process for appealing to the tax court, and provides:

"Except for an order, or portion thereof, denying the discretionary waiver of penalty or interest by the Department of Revenue, an appeal under ORS 305.275 may be taken by filing an original and one certified copy of the complaint with the clerk of the Oregon Tax Court * * * within the time required under ORS 305.280."

ORS 305.275, in turn, spells out the instances in which a taxpayer can file an appeal with the magistrate division of the Oregon Tax Court. After noting that the department could waive penalties and interest under ORS 314.145 and that the department's authority was discretionary, the *Pelett* court observed:

“The issue of whether plaintiffs are subject to penalties under ORS 314.400 is

reviewable by this court. The issue of whether defendant should have waived penalties imposed under ORS 314.400 is not reviewable by this court." *Pelett*, 11 OTR at 365.

The tax court lacks jurisdiction to consider requests to waive penalties imposed under ORS 305.992. Judge Byers concluded in *Pelett* that "[t]he clear import of this language is that the legislature did not intend this court to review defendant's discretion in waiving penalties or interest." *Id.* at 366. For that reason,

IT IS THE DECISION OF THIS COURT that the above-entitled matter be dismissed.

IT IS FURTHER ADJUDGED AND DECREED that the above notices of appeal are consolidated. The title of the case is amended as set forth in the caption of this Decision.

Dated this _____ day of December, 2000.

DAN ROBINSON
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97310. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE DAN ROBINSON ON DECEMBER 6, 2000 . THE COURT FILED THIS DOCUMENT ON DECEMBER 6, 2000.