

IN THE MAGISTRATE DIVISION
OF THE OREGON TAX COURT
Small Claims
Income Tax

DENNIS C. KAUTZ JR.,)	
)	
Plaintiff,)	No. 010053F
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
STATE OF OREGON,)	
)	
Defendant.)	DECISION AND JUDGMENT

Plaintiff appeals the department's assessment of penalty and interest for tax years 1996 and 1997. He does not claim the department erred in its assessment of the penalty and interest. Plaintiff claims that the imposition of penalty and interest violates his right to due process. Defendant, in its Answer, asks the court to uphold the penalty and interest. Defendant claims the court lacks authority to consider penalty and interest waiver requests. The court held a case management conference on March 19, 2001. The court discussed the issue with the parties at that time. Dennis Kautz appeared for himself. Mike Halter, Auditor, appeared on behalf of the defendant.

STATEMENT OF FACTS

Plaintiff did not file personal income tax returns for 1996 and 1997. Plaintiff did not file his returns because he was unable to locate copies of his withholding statements.¹ Consequently, defendant issued Notices of Assessment. These Notices included a 50% penalty and interest. Plaintiff is unable to pay any of the amounts due because he is incarcerated. He stated that he will not be out of prison for 13 years.

¹To the extent that plaintiff is able to locate proof of withholdings, defendant will reduce the tax owed accordingly.

COURT'S ANALYSIS

ORS 314.400(1)(b) sets forth when the department must impose the five percent penalty. It reads as follows:

"(1) In the case of a failure:

“* * * * *

"(b) To file a report or return of tax or tax liability or of income at the time prescribed for the filing of the report or return, there shall be added to the amount required to be shown as tax on the report or return a delinquency penalty of five percent of the amount of the tax."

Second, ORS 314.400(2)(a)(A) and (B) set forth when the department must impose the 20 and 25 percent penalties. They read as follows:

"(2) If the failure to file a report or return continues for a period in excess of three months after the due date:

"(a)(A) There shall be added to the amount of tax required to be shown on the report or return a failure to file penalty of 20 percent of the amount of such tax; and

"(B) Thereafter the Department of Revenue may send a notice and demand to the person to file a report or return within 30 days of the mailing of the notice. If after such notice and demand no report or return is filed within the 30 days, the department may determine the tax according to the best of its information and belief, assess the tax with appropriate penalty and interest plus an additional penalty of 25 percent of the tax deficiency determined by the department and give written notice of the determination and assessment to the person required to make the filing."

The department is required to impose the three penalties by the statutes cited above. The court finds that the department properly assessed the penalties pursuant to the statute.

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When the department properly imposes penalties pursuant to the statute, taxpayers may still seek a waiver of the penalty under ORS 305.145(3). That statute provides:

“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.”

The power to waive penalties is a discretionary one that lies with the department. The legislature chose to vest the department with this discretion, not the court. The Tax Court has previously held that “[t]he issue of whether defendant should have waived penalties imposed under ORS 314.400 is not reviewable by this court.” *Pelett v. Dept. of Rev.*, 11 OTR 364, 365 (1990). Plaintiff needs to submit his waiver request to the department.²

Plaintiff argues that his due process rights are violated because it is impossible for him to pay the penalties and interest. This court has previously held that “[t]he fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner.” *Tilbury v. Multnomah County*, 13 OTR 157, 161 (1994). Plaintiff had an opportunity to be heard. His due process rights were not violated.

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CONCLUSION

² Defendant stated that there is a good chance that the defendant will be willing to work with plaintiff to reduce the penalties and possibly even the tax. Any reduction to the tax would reduce the interest accordingly.

The court concludes that plaintiff is subject to the 50 percent penalty and interest. Whether he has a good reason for the penalties and interest to be canceled is not within the court's authority to consider. Now, therefore;

IT IS HEREBY ADJUDGED AND DECREED that plaintiff's appeal is dismissed.

Dated this _____ day of April, 2001.

SALLY L. KIMSEY
MAGISTRATE

**THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY ON
APRIL 17, 2001. THE COURT FILED THIS DOCUMENT ON APRIL 17, 2001.**