

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Income Tax

WILLIAM G. BARRETT )  
and GERALDINE BARRETT, )  
 )  
Plaintiffs, ) TC-MD 031133F  
 )  
v. )  
 )  
DEPARTMENT OF REVENUE, )  
STATE OF OREGON, )  
 )  
Defendant. ) **DECISION**

Plaintiffs appeal the imposition of penalty and interest relating to their 2002 personal income tax return.

Plaintiffs did not have sufficient information to timely file their 2002 personal income tax return. They filed an extension request. They did not pay any additional taxes when they filed their request. When they ultimately filed their 2002 personal income tax return, they owed and paid an additional amount.

Because the additional taxes were not paid by the original due date of April 15, 2003, Defendant assessed a 5 percent penalty and associated interest on the amount.

ORS 314.400(1)<sup>1</sup> sets forth when Defendant must impose the 5 percent penalty. It provides, in part:

"(1) In the case of a failure:

"(a) To pay a tax at the time the tax becomes due, there shall be added to the amount of tax that is shown as tax on the report or return filed by the taxpayer a delinquency penalty of five percent of the amount of such tax[.]

ORS 314.400(1)(a).

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<sup>1</sup> All references to the Oregon Revised Statutes (ORS) are to 2001.

Defendant is required to impose the 5 percent penalty by the statute cited above. The court finds that Defendant properly assessed the penalty pursuant to the statute.

When Defendant properly imposes a penalty 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.”

ORS 305.145(3).

The power to waive penalties is a discretionary one that lies with Defendant. The legislature chose to vest Defendant with that discretion, not the court. The Tax Court previously held that "the 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). Plaintiffs need to submit their waiver request to Defendant.

Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiffs' appeal is denied.

Dated this \_\_\_\_\_ day of March, 2004.

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SALLY L. KIMSEY  
MAGISTRATE

**IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY MAILING TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY HAND DELIVERY TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. 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 SALLY L. KIMSEY ON MARCH 31, 2004. THE COURT FILED THIS DOCUMENT ON MARCH 31, 2004.**