

## Ohio Board of Tax Appeals

Michael P. Anderson,	)	CASE NO. 2000-D-278
	)	
Appellant,	)	(SALES TAX - PENALTY)
	)	
vs.	)	
	)	DECISION AND ORDER
Thomas M. Zaino,	)	
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

Representative of Michael P. Anderson -

Michael P. Anderson (Pro Se)  
7029 Huntley Road – Suite H  
Columbus, OH 43229-1059

Counsel for Tax Commissioner of Ohio -

Betty D. Montgomery, Esq.  
Attorney General of Ohio  
Phyllis J. Shambaugh, Esq.  
Asst. Attorney General  
State Office Tower – 16<sup>th</sup> Floor  
30 East Board Street  
Columbus, OH 43215

ENTERED: May 26, 2000

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

An appeal, pursuant to R.C. 5717.02, from a final determination of the Tax Commissioner of Ohio, In re: Assessment Serial No. 7990408333, Vendor’s License No. 25-268049.

On March 10, 2000, a notice of appeal [letter] was filed with this Board, the body of which states:

“Dear Sirs,  
“In reply to your Final Determination of assessment serial # 7990408333 I would like to file an appeal for the following reason:  
“1.) Penalty remission was insufficient.”

On April 28, 2000, the Tax Commissioner, in compliance with R.C. 5717.02, certified to this Board a transcript of the record of the proceedings before him, together with all evidence considered by him in connection therewith. The body of the Tax Commissioner's final determination, a copy of which is included in the certified transcript, states in part:

"The assessment is a result of an audit of the petitioner's sales for the period of May 1, 1995 through January 31, 1998. The petitioner tentatively raised objections in the petition for reassessment but at the hearing waived the objections and requested remission of the penalty and additional charge. This request is allowed as noted.

"Therefore, it is the order of the Tax Commissioner that if payment of

	<u>Assessment</u>	<u>Penalty</u>	<u>Total</u>
Sales Tax	\$58,732.46	\$13,157.71	\$71,890.17
Preassessment Interest	\$ 9,836.63	\$ 0.00	\$ 9,836.63
Additional charge	\$ 5,000.00	\$ 500.00	\$ <u>5,500.00</u>
		Total	\$87,226.80

is made within thirty (30) days after receipt by the taxpayer of this final determination, the assessment shall stand as adjusted in the above amount. If this matter is appealed to the Board of Tax Appeals, to an appropriate Court of Appeals, or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

"If the total amount is not paid as above provided, the assessment shall stand as adjusted in the following amounts:

	<u>Assessment</u>	<u>Penalty</u>	<u>Total</u>
Sales Tax	\$58,732.46	\$13,157.71	\$71,890.17
Preassessment Interest	\$ 9,836.63	\$ 0.00	\$ 9,836.63
Additional charge	\$ 9,299.39	\$ 1,394.91	\$ <u>10,694.30</u>
		Total	\$105,070.34"

On May 8, 2000, pursuant to assignment and notice given thereof, the matter came on to consider any additional evidence that might be adduced by the parties hereto. The Appellant, Mr. Anderson, appeared and made a testimonial statement on his own behalf. The Tax Commissioner appeared through his counsel.

Page 42, of the certified transcript, is a “Summary of Unreported Tax Liability,” which includes a summary computational analysis of the sales tax penalty computation. Such calculated penalty explanation appears to be in conformity with the penalty provisions of R.C. 5739.133(A)(2) and (3). The Tax Commissioner, as authorized by R.C. 5739.133(C), granted the petitioner’s requested remission of the penalty in part. The Appellant’s only assignment of error is that the amount of the penalty remitted by the Tax Commissioner was insufficient.

The initial assessment of the penalty prescribed by statutory law is mandatory. *Plowden & Roberts v. Porterfield* (1970), 21 Ohio St.2d 276. The Tax Commissioner was authorized to remit such part of the penalty assessed in whole or in part, as he may deem proper. *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67. The remission of a penalty is discretionary with the Tax Commissioner and cannot be reversed by the Board of Tax Appeals unless an abuse of discretion is demonstrated. *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483.

It is well-settled in Ohio that the term “abuse of discretion” connotes more than an error of judgment. Instead, as the term implies, in relation to interfering with the discretionary power of administrative officers, that there has been a “perversity of will, passion, prejudice, partiality, or moral delinquency” which affect the decision-making process. *State, ex rel. Shafer, v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590-591; *State ex rel. Commercial Lovelace Motor*

*Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193. This Board may not substitute its own judgment for that of the Tax Commissioner. *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29, 32. Here, the record is devoid of evidence that the Tax Commissioner abused his discretion when the penalties were not totally or additionally remitted.

The Board of Tax Appeals finds and determines, upon the record and as a matter of law, that the Tax Commissioner's partial remission of the statutory penalty was reasonable and lawful; the Appellant has failed to establish otherwise.

IT IS ORDERED that the Tax Commissioner's final determination, which is the subject of this appeal, is reasonable and lawful and is therefore affirmed.

IT IS FURTHER ORDERED that a certified copy of this decision and order be sent to the Tax Commissioner, to the Appellant, and to counsel for the Appellee.

ohiosearchkeybta