

OHIO BOARD OF TAX APPEALS

Robert and Elizabeth Campbell,)	
)	CASE NO. 01-T-487
Appellants,)	
)	
vs.)	(PENALTY REMISSION)
)	
Thomas M. Zaino, Tax)	
Commissioner of Ohio,)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

For the Appellants - Elizabeth Campbell, *pro se*
8717 Braun Road
Groveport, Ohio 43215

For the Appellee - Betty D. Montgomery
Attorney General of Ohio
By: Richard C. Farrin
Assistant Attorney General
Taxation Section
State Office Tower, 16th Floor
30 East Broad Street
Columbus, Ohio 43215

ENTERED: September 28, 2001

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

This matter is before the Board of Tax Appeals pursuant to a notice of appeal filed by Robert and Elizabeth Campbell. The Campbells appeal from the Tax Commissioner's denial of two applications for the remission of real property tax penalties. The Board of Tax Appeals now considers this matter upon the notice of appeal and the statutory transcript certified to the Board by the Tax Commissioner. Both parties waived an opportunity to present additional evidence at a hearing before this Board.

According to the record, the real property taxes for the two periods in question were due to be paid to the Franklin County Treasurer on or before January 20, 2000, and June 20, 2000. The treasurer, however, did not receive payment until January 23, 2001. Consistent with the applicable provisions of R.C. 323.121, the treasurer assessed a penalty of ten percent for the late payment of the tax. This penalty totals \$105.28 for both periods.

The record indicates that the Campbells purchased the subject property on May 28, 1997. At that time, as indicated on their conveyance fee statement, the Campbells requested that all real property tax bills be sent to the mortgage company. (S.T. 9) According to the Campbell's application for remission, in September 1999, the Campbells closed on a new loan, which included funds disbursed for a house the Campbells erected on the subject property. Mrs. Campbell represents on the application that "[p]rior to September 18, 1999 our taxes on the land were paid through escrow *** and after we closed on the home loan, I assumed we would get a statement ***." (S.T. 4) The Campbells represent that no tax bills were received. At some undisclosed time prior to payment, Mrs. Campbell represents that she contacted the treasurer about a tax bill and was informed that one would be forthcoming in January 2001.

The Campbells argue that their failure to timely pay their real estate taxes was the result of an error committed by the treasurer. In recommending that no remission be granted, the treasurer indicates that the county had not been notified of any change in address. Thus, the treasurer represents that no error was committed.¹

We begin our review of this matter by noting that the findings of the Tax Commissioner are presumptively valid. A taxpayer that challenges a finding has the burden of

rebutting this presumption and of establishing a right to the relief requested. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. When no competent and/or probative evidence is developed and properly presented to the Board which establishes that the Tax Commissioner's determination is "clearly unreasonable or unlawful," his determination is deemed to be correct. *Id.*

R.C. 5715.39 governs the instances in which the Tax Commissioner may remit a penalty imposed for the failure to timely pay real property taxes and provides, in pertinent part:

"The commissioner, on application by a taxpayer, shall remit a penalty for the late payment of any real property taxes or manufactured home taxes when:

"(A) The taxpayer could not make timely payment of the tax because of the negligence or error of the auditor or treasurer in the performance of a statutory duty relating to the levy or collection of such tax.

"(B) In cases other than those described in division (A) of this section, the taxpayer failed to receive a tax bill or a correct tax bill, and the taxpayer made a good faith effort to obtain such bill within thirty days after the last day for payment of the tax.

"(C) The tax was not timely paid because of the death or serious injury of the taxpayer, or his confinement in a hospital within sixty days preceding the last day for payment of the tax, if, in any case, the tax was subsequently paid within sixty days after the last day for payment of such tax.

"(D) The taxpayer demonstrates to the satisfaction of the commissioner that the full payment was properly deposited in the mail in sufficient time for the envelope to be postmarked by the United States postal service on or before the last day for payment of such tax. A private meter postmark on an envelope is not a valid postmark for purposes of establishing the date of payment of such tax.

¹ In February 2001, the Campbells filed with the treasurer an address change form, requesting that the tax bills be sent to the new mortgage company. (S.T. 10.)

“The commissioner shall consider the application, determine whether the penalty should be remitted, and certify the determination to the taxpayer, to the county treasurer, and to the county auditor, who shall correct the tax list accordingly.”

The initial assessment of the penalty is prescribed by statute and is mandatory. *Plowden & Roberts v. Porterfield* (1970), 21 Ohio St.2d 276. Unlike other penalty statutes, the Commissioner has no discretion under R.C. 5715.39 regarding the remission of penalties; he is required to grant remission only if the express conditions of the statute are met. *Labuda v. Tracy* (June 13, 1993), BTA No. 92-M-416, unreported. Even if a property owner's situation is sympathetic, the Commissioner is unable to remit the penalty if the failure does not fall within one of the narrowly defined fact patterns.

R.C. 323.13 provides that the failure to receive any tax bill does not, in and of itself, excuse a failure to timely pay the bill. Thus, under R.C. 5715.39(A) and (B), failure to receive a tax bill will result in remission only where the taxpayer proves the bill was not received due to the treasurer's error or negligence, or, if there has been no negligence or error, where the taxpayer makes a good faith effort to acquire the bill within thirty days after the last day upon which payment could have been made. While the Campbells do indicate that they contacted the treasurer's office regarding tax billing, there is no evidence before us as to the content of those contacts or as to when they may have occurred. We are therefore unable to find under R.C. 5715.39(B) that the Campbells made an attempt to obtain or pay the bills within the thirty-day period after payment was due.

With regard to the Campbell's negligence claim, we can find no negligence or error on the part of the treasurer. There is no evidence in the record to suggest that the Campbells

requested a change in the tax billing address prior to February 2001, and the Campbells admit that, upon closing, they merely “assumed” the bills would be sent to them. We recognize that the Campbells also represent that they were informed by the treasurer that the bills were sent to an address other than the one originally given by the Campbells. The Campbells have provided no evidence that such a mailing occurred, nor do the treasurer’s records indicate an incorrect mailing.² This is not to say that we question the Campbell’s truthfulness; we do not. However, the burden rests with the Campbells to offer competent and probative evidence in support of their claims. In the instant matter, we are unable to find any evidence of negligence or error on the part of the treasurer. We reiterate that the present situation is not a matter of discretion but one that requires both the Commissioner and this Board to grant remission only where the express provisions of R.C. 5715.39 have been met. *Labuda, supra*.

In closing, we also note that the penalty imposed upon the Campbell’s tax bills should not be construed as a fine for an act of malfeasance or nonfeasance on the part of the Campbells. Instead, the penalty is “merely an indication that a governmental agency, which depends upon tax dollars for efficient management, failed to receive a timely payment and a taxpayer, not as a matter of willful neglect, failed to make timely payment. Except for very limited situations, the General Assembly has placed the responsibility for prompt payment upon the taxpayer.” *Ledford v. Zaino* (Sept. 1, 2000), BTA No. 00-M-291, unreported.

Based upon the record before us, we are unable to find that the Campbells have demonstrated to this Board that they have satisfied the prerequisites for remission under R.C.

² The address in question, 7820 Braun Road, was a tax billing address used prior to the Campbell’s purchase of the subject property in 1997. At the time of the purchase, the address was changed to the mortgage company. No other change is evidenced in the treasurer’s records until February 2001. (S.T. 8.)

5715.39 or that the Tax Commissioner's denial was otherwise erroneous. Therefore, it is the decision and order of the Board of Tax Appeals that the Commissioner's denial of the applications for remission be, and the same hereby is, affirmed.

ohiosearchkeybta