

**OHIO BOARD OF TAX APPEALS**

Bryan & Paulette Swiger, )  
 )  
 Appellants, ) CASE NO. 2002-A-1909  
 )  
 vs. ) (REAL PROPERTY TAX  
 ) PENALTY REMISSION)  
 )  
 Thomas M. Zaino, Tax Commissioner )  
 of Ohio, ) DECISION AND ORDER  
 )  
 Appellee. )  
 )  
 APPEARANCES: )

For the Appellants - Paulette Swiger, pro se  
P.O. Box 177  
Spencer, Ohio 44275

For the Appellee - Jim Petro  
Attorney General of Ohio  
Janyce C. Katz  
Assistant Attorney General  
State Office Tower  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215

Entered March 7, 2003

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellants from a denial, by the Tax Commissioner, of appellants’ “Application for the Remission of Real Property and Manufactured Home Tax Penalties.”

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, and the

record of the hearing before this board. Although duly notified by letter, no one appeared on behalf of the appellants, Mr. and Mrs. Swiger, at the board's hearing.

In reviewing appellants' appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Initially, we note, according to appellants' application for remission, that appellants' real property taxes were due on July 12, 2002, but were not paid until July 31, 2002. Appellants set forth their contentions about the late payment in such application, which provides, in pertinent part, as follows:

"The above parcel was sold at sheriff sale on May 22, 2002. Case No. 01CV129118. We were the high bidder at the sale.

"The deed transferred to us on July 16, 2002. On July 12, 2002 the taxes were due. They were not paid, and therefore there was a 10% penalty accrued.

"It is my understanding that on a property sold thru sheriff sale all back taxes are paid out of the proceeds of the sale. In this case, they were all paid on 7-31-02, except for the 10% penalty. I do not feel that we should be responsible for late penalty when we were not the owners of said property when late fee penalty accrued to property."

The appellants' notice of appeal goes on to provide, in part:

“My husband and I were the high bidders on the above parcel at Lorain County Sheriff Sale on May 22, 2002. The required 10% down was paid.

“On July 12, 2002, a Friday afternoon, Deputy Mary Ochenas called and let me know that the sale had confirmed, and that I had eight days to bring the balance due.

“After hanging up the phone \* \* \*, I immediately called my bank and scheduled the next available appointment to come in. An appointment for Tuesday morning at 9:00 a.m. was scheduled.

“On Tuesday, July 16, 2002, we were at our bank at 9:00 a.m., picked up the check to take to the sheriff's dept, and were then on our way to the sheriffs dept. We arrived at the sheriff dept sometime before noon, paid our balance due, and took all of the other necessary steps to transfer the property, and record the deed into our name.

“Approximately two weeks later, the sheriff's dept disbursed funds. Out of those funds came the real estate taxes. By paying the real estate taxes two weeks after I paid our balance due, the taxes were paid to the county treasurer by the proceeds of the sale on the 31<sup>st</sup> of July 2002.

“My argument is that on July 12, 2002, I had no knowledge that real estate taxes were due on this parcel. When a property is purchased at sheriff sale, all delinquent taxes are paid out of the proceeds of the sale – so when taxes were due on the parcel never even crossed my mind. Not only did I have no knowledge taxes were even due, we were not even the owners of the parcel on July 12, 2002. I was notified on July 12, 2002 that the sale had confirmed.”

Neither the county treasurer nor the county auditor made a specific recommendation regarding appellants' request for remission.

A penalty is charged by the county treasurer against the taxes for late payment pursuant to R.C. 323.121. Unlike other penalty remission statutes, the Tax Commissioner is given no discretion in the remission of penalties that are levied against the late payment of real property tax pursuant to R.C. 323.13. R.C. 5715.39 is specific in defining the circumstances under which late payment penalties may be remitted. Even if a property owner's situation is sympathetic, if it does not fall within the prescribed circumstances, the commissioner is unable to remit the penalty. *Labuda v. Tracy* (June 13, 1993), BTA No. 1992-M-416, unreported.

Appellants' request for remission of penalty in the instant matter must be predicated on at least one of the provisions of R.C. 5715.39, which provide for remittance of such penalty 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 the taxpayer's 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.”

Under the unique circumstances of the instant matter, we find that appellants did not become the “taxpayers” as contemplated by R.C. 5715.39 until the closing of the sheriff’s sale that occurred on July 16, 2002. The sheriff’s sale was confirmed on July 12, 2002 and appellants completed the transaction by payment of the balance due within the authorized period. Payment of the real estate taxes became a responsibility of appellants, but it was the duty of the sheriff to disburse the taxes from the proceeds of the sale. Irrespective of whether the appellants were actually presented with the real estate bill, it should have been with the other closing documents received by the appellants at closing; however, their liability was established on July 16, 2002. Ultimately, the sheriff paid the taxes as due on July 31, 2002, which is within the thirty day period established for remission in R.C. 5715.39(B). We conclude that these circumstances support and justify remission of the penalty.

Accordingly, this board finds that the Tax Commissioner’s denial of remission was contrary to law. It is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is reversed.

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