

OHIO BOARD OF TAX APPEALS

Lee V. Silvis,)
)
 Appellant,)
)
 vs.)
)
)
)
 Thomas M. Zaino,)
 Tax Commissioner of Ohio,)
)
 Appellee.)

CASE NO. 2002-G-1585
(PERSONAL PROPERTY TAX
PENALTY ABATEMENT)
DECISION AND ORDER

APPEARANCES:

For the Appellant - No Appearance

Appeal Filed By - Saltz, Shamas & Goldfarb, CPAs
Karen J. Stell
32125 Solon Road, Suite 200
Cleveland, Ohio 44139

and

Lee V. Silvis
Lee's Automotive
9546 Knowlton Road
Garrettsville, Ohio 44231

For the Appellee - Jim Petro
Attorney General of Ohio
Barton H. Hubbard
Assistant Attorney General
State Office Tower, 16th Floor
30 East Broad Street
Columbus, Ohio 43215

Entered March 7, 2003

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed on behalf of the above-named appellant. Appellant appeals a final determination

of the Tax Commissioner, in which said official denied appellant's petition for abatement of a personal property tax late filing penalty.

The final determination of the Tax Commissioner reads in part as follows:

“This matter now comes on for final determination. It involves a Petition pursuant to Section 5711.28 of the Ohio Revised Code (R.C.) for abatement of a personal property tax late filing penalty assessment.

“R.C. 5711.27 provides that if the return is not filed within the dates required by R.C. 5711.04, there shall be assessed to the return a penalty of up to 50% and a penalty of one-half of the \$10,000 list value otherwise exempt under R.C. 5709.01 (C) (3).

“In this instance, the return was due by April 30, 2002. The tax return was filed with the Geauga County Auditor’s office on May 9, 2002. A penalty of a forfeiture of one-half of the exempt value and 5% of the remaining listed value was assessed on May 13, 2002.

“A representative of the taxpayer filed a Petition requesting abatement of the above penalties. In her Petition, the representative stated that the taxpayer had a time extension to file the tax return, but the extension was for Portage County and not Geauga County.

“The Tax Commissioner notes that the representative asked Portage County for the time extension.

“In *Transcon, Inc. v. Limbach*, BTA Case No. 89-F-697 (April 26, 1991), the Board of Tax Appeals states in part:

‘Reliance upon an accountant is not uncommon, but that reliance cannot function to excuse a taxpayer from the consequences of his failure to comply with the settled principle that tax returns have fixed filing dates and returns must be filed (and taxes paid) when due or serious problems will surely result.

'Failure to comply with a basic statutory obligation is not excused simply by the assignment or delegation of a portion of the responsibility therefor.'

"R.C. 5711.28 provides that penalties can be abated if the late filing was brought about by reasonable cause and in the absence of willful neglect. In this instance, the Tax Commissioner finds the petitioner's request is not well taken in that the return was filed after the due date without reasonable cause; and the records disclose that the taxpayer filed the 1997 and 1998 tax returns late, and that the taxpayer listed no taxable value on the 1997 return. Therefore, the subject assessment shall stand as made."

Appellant's notice of appeal, which was filed by his accountants, provides in pertinent part, as follows:

"Please grant an abatement of penalty and restore the exemption for the County tax return for Lee's Automotive. The taxpayer filed a timely extension, however inadvertently filed with Portage County instead of Geauga County. I am enclosing a copy of the request as well as the grant for extension (permit #51) from Portage County.

"As a new accountant working for the above-mentioned taxpayer, I called Geauga County to verify the accuracy of filing with the proper county as I do with all new clients. Geauga County informed me that they didn't have this street in their county limits and Geauga was not the proper County to file nor did they have any past record of this taxpayer. I immediately called Portage County and was told that this is the proper county to file therefore I filed the extension with Portage County on my clients [sic] behalf.

"However, the taxpayer chose to file in Geauga County because he was informed in previous years that Geauga was the correct county to file. The taxpayer felt he should continue filing with Geauga for consistency purposes. Ultimately, the personal property tax return was filed in Geauga County with the attachment of the Portage

extension. The above occurred during the months of April and May.

“I recently called Geauga County to verify the accuracy filing again. I spoke with Mary Kay Shea and she informed me that the address of the schedule C property of 7331 Aurora Road, Aurora Ohio was not within the limits of Geauga County. I called Carolyn Pennics at Portage County and this time the County indicated that the address was not within the County limits. I then called Alison Taylor at Summit County and she too indicated that this address was not within the County limits, nor a parcel.

“The business certainly lies within County limits however, Geauga, Portage and Summit have not claimed it. The Counties have been unable to clearly determine which County the business property is located. This error of the County is no fault of the taxpayer.

“Please abate the penalties associated with the above-mentioned taxpayer since the late filing was brought about by reasonable cause as stated above and there is absence of willful neglect. My client wanted to be consistent with his past filings and file with Geauga County even though we had filed a timely extension for Portage County, as I was originally instructed to do by Portage County. Based on the information above and since Lee’s Automotive is in good standing with the county, please grant the abatement of penalty.”

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 (“S.T.”), and the record of the hearing before this board. Although duly notified of the hearing there was no appearance on behalf of the appellant. Counsel appeared for and on behalf of the Tax Commissioner.

First, the board notes that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121.

In addition, the taxpayer has the affirmative duty to come forward and prove the Tax Commissioner's findings are unreasonable, unlawful, or erroneous. *Manfredi Motor Transit Co. v. Limbach* (Aug. 17, 1990), BTA No. 1987-F-279, unreported. When no competent and probative evidence is presented by the appellant to show that the commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Averill v. Limbach* (Aug. 23, 1991), BTA No.1990-C-1647, unreported.

Every taxpayer owning taxable personal property must annually file a personal property tax return with the county auditor of each county where the property is located. R.C. 5711.02.

R.C. 5711.04 sets forth the time for making such returns and provides in pertinent part as follows:

“Returns shall be made, annually, between the fifteenth day of February and the thirtieth day of April; ***. Upon verified application of any taxpayer, and for good cause shown, the county auditor may extend the time within which such taxpayer may make his return for a further specified period, not exceeding forty-five days. ***”

In the event a return is not timely filed in accordance with R.C. 5711.04, R.C. 5711.27 requires that the following penalties be assessed:

“(A) In the case of a taxpayer who fails to make a timely return, the assessor shall add to the taxpayer's assessment as a penalty, one-half of the taxpayer's taxable value that is exempt from taxation under division (C)(3) of section 5709.01 of the Revised Code. ***

“(B) In the case of a taxpayer who fails to make a timely return, *** the assessor shall add to the assessment of each class or item of taxable property which the taxpayer failed

to return, list or disclose and to any amount added under division (A) of this section, a penalty of up to fifty per cent thereof; but if such taxpayer makes, within sixty days after the expiration of the time prescribed by such sections, a return or an amended or supplementary return and lists therein or discloses on an accompanying balance sheet or in other information filed with the return all items of taxable property which he is required by such sections to list, and in all cases in which the taxpayer's only default is his failure to pay the amounts specified in section 5719.02 of the Revised Code within the time therein specified, such penalty shall be five per cent of the assessment, ***.

“***

“Either or both of the penalties provided in this section may be abated in whole or in part by the assessor when it is shown that such failure is due to reasonable cause. ***”

Although we sympathize with appellant's situation, we note that the issue here is not whether this board might have granted abatement under the circumstances, but rather did the Tax Commissioner's denial constitute an abuse of discretion. The Tax Commissioner's authority to abate penalties assessed pursuant to R.C. 5711.27 is discretionary. R.C. 5711.28; *Coleman Young Motors, Inc. v. Limbach* (1988), 51 Ohio App.3d 117. Therefore, this board will not reverse the commissioner's decision unless his actions constitute an abuse of discretion. *Id.*; *Moon v. Tracy* (Nov. 24, 1993), BTA No. 1993-B-157, unreported. Generally, the Tax Commissioner abuses his discretion when the record manifests that his decision is “unreasonable, arbitrary, or unconscionable.” *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67.

Relative to what constitutes an abuse of discretion, we note the Supreme Court's decision in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, in which the court, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, stated:

“[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias. * * *”

Further, this board has ruled on several occasions that relying upon an accountant was not adequate grounds to remit a penalty. In *Steinmetz v. Tracy* (Oct. 2, 1998), BTA No. 1997-T-497, unreported, we stated:

“Generally, each taxpayer is presumed to know the statutory laws, rules and regulations concerning compliance with the tax laws of the state. *Carlisle Geauga Co. v. Tracy* (July 7, 1995), B.T.A. No. 94-R-1244, unreported. Being unaware of those requirements has not traditionally been accepted as a reason for not filing a tax return. *Bessie Regas v. Tracy* (Nov. 29, 1996), B.T.A. No. 96-N-349, unreported. Moreover, while Steinmetz relied upon an accounting professional to meet all of its tax obligations, this does not absolve the taxpayer from the responsibility for seeing that returns have been filed and any amount due remitted. In *Transcon, Inc. v. Limbach* (Apr. 26, 1991), B.T.A. No. 89-F-697, unreported, we stated the following:

“Reliance upon an accountant is not uncommon but that reliance cannot function to excuse a taxpayer from the consequences of his failure to comply with the settled principle that tax returns have fixed filing dates and returns must be filed (and taxes paid)

when due or serious problems will surely result. Failure to comply with a basic statutory obligation is not excused simply by the assignment or delegation of a portion of the responsibility therefor.'

“We recognize that Steinmetz took steps to hire a professional who Steinmetz believed would enable the corporation to meet its filing requirements. In this sense, Steinmetz believes it fulfilled its duty. However, the ultimate responsibility for filing lies with the taxpayer, the omissions of an agent notwithstanding.”

See, also, *Kim's Affidavit Service, Inc. v. Zaino* (Jan. 18, 2002), BTA No. 2001-B-998, unreported.

In the present case, the record supports the Tax Commissioner's determination that appellant's personal property tax return for 2002 was not timely filed. Although the accountants sought to confirm the location of the property, they used an incorrect address for the property in their inquiries to the various county auditors. The notice of appeal states that the inquiries were made for 7331 Aurora Road, Aurora, Ohio. The correct address for the property is 7331 Kent Road, which is located in Geauga County. (See appellee's exhibit A.) Therefore, the accountants, and not the county officials, made the error. Further, the statutory transcript evidences that appellant's tax returns for tax years 1997 and 1998 were not timely filed. (S.T. 18, 19 and 20) While we are sympathetic to appellant's situation, he failed to provide any evidence to show that the Tax Commissioner acted unreasonably, arbitrarily or unconscionably in failing to abate the penalties assessed for 2002.

Accordingly, it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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