

OHIO BOARD OF TAX APPEALS

Ohio Water Care, Inc.,)	
)	CASE NO. 2003-G-338
)	
Appellant,)	(PERSONAL PROPERTY TAX
)	PENALTY ABATEMENT)
vs.)	
)	DECISION AND ORDER
)	
Thomas M. Zaino,)	
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	No Appearance Ohio Water Care, Inc. 4145 Pearl Road Cleveland, Ohio 44109
Notice of Appeal filed by	-	William Foggy Executive Vice President Ohio Water Care, Inc. 4145 Pearl Road Cleveland, Ohio 44109
For the Appellee	-	Jim Petro Attorney General of Ohio Barton A. Hubbard Assistant Attorney General State Office Tower, 16 th Floor 30 East Broad Street Columbus, Ohio 43215

Entered December 19, 2003

Ms. Jackson, Ms. Margulies, and Mr. Eberhart 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 personal property tax late filing penalty assessments.

"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, 2001. The 2002 return was due by the extended due date of June 17, 2002. The tax returns were filed with the Cuyahoga County Auditor's office on June 20, 2002. Penalties of a forfeiture of one-half of the exempt values and 10% of the remaining listed value for the 2001 return and 5% of the remaining listed value for the 2002 return were assessed on June 24, 2002.

"The taxpayer filed a Petition requesting abatement of the above penalties. In his Petition, the taxpayer stated in part: As the new manager of the Corporation, I was unaware of the required filings.

"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 returns were filed after the due dates without reasonable cause; and the records disclose that the taxpayer filed the 1994 tax return late. Therefore, the subject assessment shall stand as made."

Appellant's notice of appeal states that the penalty should be abated because the appellant, as the new general manager of the corporation, was unaware of the filing requirement. Further, he had no knowledge of the late 1994 return which preceded his management. Regarding the 2001 return, by the time he supplied the records to his accountant, the time for an extension request had expired. He received an extension for the 2002 return, but did not mail it until the day it was due in the auditor's office.

At the hearing before this board, Mr. Tony Smith, a certified public accountant, testified on behalf of the appellant. Mr. Smith stated that he had another full-time job but did work on an ad hoc basis for Mr. Foggy. Mr. Foggy was originally an employee of the appellant company; however, when the owners contemplated selling the business, he began negotiations to purchase the company. Around June of 2000, after ongoing negotiations, Mr. Foggy engaged Mr. Smith's services. Due to his obligations with his full time job, Mr. Smith got busy and did not acquire the information needed to file the return for tax year 2000 until late 2001, and ultimately the return was mailed with the 2002 return. Mr. Smith testified that it was because of his error that the 2002 return was late. He thought that it would be sufficient to have the return postmarked the day it was due. Consequently, both returns were filed late on June 20, 2002.

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 evidentiary hearing before this board.

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 Ohio 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 *Michael S. Steinmetz, D.D.S., Inc. 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.” Id. at 8-9.

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 returns for 2001 and 2002 were not timely filed. While we are sympathetic to appellant’s situation, it failed to provide any evidence to show that the Tax Commissioner acted unreasonably, arbitrarily or unconscionably in failing to abate the penalties assessed for 2001 and 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.