

**OHIO BOARD OF TAX APPEALS**

Maple Hgts. Lanes, Inc.,	)	
	)	
Appellant,	)	CASE NO. 2003-P-1401
	)	
vs.	)	(PERSONAL PROPERTY TAX
	)	PENALTY ABATEMENT)
Thomas M. Zaino,	)	
Tax Commissioner of Ohio,	)	DECISION AND ORDER
	)	
Appellee.	)	

APPEARANCES:

For the Taxpayer	- No Appearance Maple Hgts. Lanes, Inc. 15809 Libby Road Maple Heights, Ohio 44137
Notice of Appeal Filed By	- Jeffrey C. Domzalski Maple Hgts. Lanes, Inc. 15809 Libby Road Maple Heights, Ohio 44137
For the Tax Commissioner	- Jim Petro Attorney General of Ohio Richard C. Farrin Senior Deputy Attorney General Taxation Section State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215

Entered June 17, 2005

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Maple Hgts. appeals a final determination of the Tax Commissioner dismissing its petition for abatement of personal property tax late filing penalties for tax year 2003. The Tax Commissioner determined that Maple Hgts. did not file its petition for abatement within the sixty-day time period set forth in R.C. 5711.28. Upon careful review, we find that Maple Hgts. has failed to satisfy its assigned evidentiary burden to establish error on the part of the Tax Commissioner. Accordingly, we affirm the Tax Commissioner's final determination.

Maple Hgts.’ personal property tax return bears a stamp that indicates it was received by the Cuyahoga County Auditor’s office on May 2, 2003, a date that is beyond the time frame set forth in the applicable statute.<sup>1</sup> The Cuyahoga County Auditor assessed a late filing penalty of one-half the exempt value and five percent of the remaining listed value in accordance with the provisions of R.C. 5711.27. An affidavit signed by the auditor’s representative states that the assessment was mailed to Maple Hgts. on May 14, 2003.<sup>2</sup> Maple Hgts. responded by filing a petition for abatement. But the auditor’s stamp indicates that the petition for abatement was not received until July 18, 2003 - - - once again, a date that is beyond the time period provided in the statute.<sup>3</sup> Upon reviewing the matter, the Tax Commissioner dismissed Maple Hgts.’ petition for abatement as having been untimely filed. Maple Hgts. now appeals that determination. The record before us consists of the notice of appeal, the statutory transcript filed by the Tax Commissioner in accordance with the provisions of R.C. 5717.02, and the record from our merit hearing. Maple Hgts. did not appear at the hearing. No briefs have been filed.

We begin by observing that the Tax Commissioner has made a specific finding that Maple Hgts.’ petition for abatement was untimely filed. And the Supreme

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<sup>1</sup> R.C. 5711.04(A) provides: “\*\*\* [R]eturns shall be made, annually, between the fifteenth day of February and the thirtieth day of April.”

<sup>2</sup> St – 14.

<sup>3</sup> R.C. 5711.28 provides: "*Within sixty days after the mailing of the notice of a penalty assessment prescribed by this section, the taxpayer may file with the tax commissioner, in person or by certified mail, a petition for abatement of such penalty assessment.*" (Emphasis added.)

Court has held that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It thus becomes incumbent upon Maple Hgts. to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135, *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69, *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, *National Tube v. Glander* (1952), 157 Ohio St. 407. Maple Hgts. is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213.

In the matter sub judice, however, we are offered no evidence to controvert the Tax Commissioner's findings. Certain assertions do appear in Maple Hgts.' notice of appeal. But mere assertions in a notice of appeal are insufficient to satisfy an appellant's evidentiary burden. The Supreme Court observed in *Felton v. Felton* (1997), 79 Ohio St.3d 34, at paragraph three of the syllabus:

“A pleading is not admissible into evidence at a hearing to prove a party's allegations and must not be considered as evidence by the court. (*State ex rel. Copeland v. State Med. Bd.* [1923], 107 Ohio St. 20, 1 Ohio Law Abs. 165, 140 N.E. 660, paragraph two of the syllabus; *Hocking Valley Ry. Co. v. Helber* [1915], 91 Ohio St. 231, 110 N.E. 481, paragraph three of the syllabus, applied and followed.)”

And we remarked in *Cunagin v. Tracy* (Mar. 31, 1995), BTA No. 1994-P-1083, unreported:

“Appellants’ notice of appeal is not an adequate substitute for reliable documentary and testimonial evidence. The notice of appeal merely constitutes unsworn, unproven statements, claims and allegations. Evidence presented at hearing is accepted only upon conditions designed to insure its reliability. Appellants must first be sworn on oath. Their sworn testimony is then scrutinized and subjected to cross-examination. Documentary evidence is also subjected to the scrutiny of the parties and their counsel. In the matter before us counsel for the tax commissioner indicated at the merit hearing that there were substantial questions of fact behind the tax commissioner’s determinations. The final determination supports this view. Without admissible evidence, we are unable to find that those factual determinations were made in error.”<sup>4</sup> Id. at 3.

In *Leiphart Lincoln-Mercury, Inc. v. Bowers* (1958), 107 Ohio App.

259, the Lucas County Court of Appeals observed:

"The courts of Ohio have fully recognized as fundamental and elementary that a litigant has no inherent right of appeal or review, that there is no common law right of appeal, which right is purely statutory, and that to have jurisdiction of an appeal provisions of law providing the method of appeal must be complied with." Id. at 264.

In *The American Restaurant and Lunch Company v. Glander* (1946),

147 Ohio St. 147, the Supreme Court further commented:

"These requirements are specific and in terms that are mandatory. The very statute which authorizes the appeal prescribes the conditions and procedure under and by which such appeal may be perfected. Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right

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<sup>4</sup> See, also, *Executive Express, Inc. v. Tracy* (Nov. 5, 1993), B.T.A. No. 92-P-880, unreported.

conferred. 'The party who seeks to exercise this right, must comply with whatever terms the statutes of the state impose upon him as conditions to its enjoyment.'" Id. at 149 – 150.

The Supreme Court has applied these principles to petitions filed with the Tax Commissioner in the same manner as it has to appeals filed with a court. In *Akron Standard Division of Eagle-Picher Industries, Inc. v. Lindley* (1984), 11 Ohio St.3d 10, the Supreme Court observed at footnote 2:

"It should be noted that we are not bound by *stare decisis* since *American Restaurant* specifically applies to 'appeals' only. However, finding no appreciable difference between appeals and reassessment petitions in this procedural context, we find the language of *American Restaurant* to be instructive." Id. at 11.

Because we find from the record before us that Maple Hgts.' petition was filed beyond the sixty-day period set forth in R.C. 5711.28, it follows in logic that we must also find that the Tax Commissioner correctly determined that he was without jurisdiction to consider Maple Hgts.' petition for abatement.

But even if Maple Hgts.' petition for abatement was timely filed, we still would be unable to grant the relief Maple Hgts. requests. R.C. 5711.27 provides: "No taxpayer shall fail to *make a return* within the time prescribed by law \*\*\*." We have previously held that the phrase "make a return" requires that the return be *received* by the auditor. Mere deposit in a postal receptacle is insufficient. The United States Supreme Court held many years ago in *United States v. Lombardo* (1916), 241 U.S. 73:

“The word ‘file’ is derived from the Latin word ‘filum,’ and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. ‘Shall file’ means to deliver to the office and not sent through the United States mails. *Gates v. State* 128 N.Y. Court of Appeals, 221. A paper is filed when it is delivered to the proper official and by him received and filed. *Bouvier Law Dictionary*; *White v. Stark*, 134 California, 178; *Westcott v. Eccles*, 3 Utah, 258; *In re Van Varcle*, 94 Fed. Rep. 352; *Mutual Life Ins. Co. v. Phiney*, 76 Fed. Rep. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act.”<sup>5</sup> *Id.* at 76.

While Ohio’s personal property tax employs the phrase “make a return” rather than “file,” we held in *Nu-Chiropractic, Inc. v. Zaino* (June 1, 2001), BTA No. 2001-P-70, unreported, that we did not find a meaningful distinction concerning the requirement of delivery to and receipt by the proper public official. As a result, even if Maple Hgts.’ petition for abatement was timely filed, we would still be required to find that Maple Hgts. failed to file its underlying tax return in a timely manner. For we find no competent, credible, probative evidence to establish that the auditor did not *receive* the return until May 2, 2003- - - a date subsequent to the due date.

Accordingly, and for each of the foregoing reasons, the final determination of the Tax Commissioner must be, and the same hereby is, affirmed.

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<sup>5</sup> *United States v. Lombardo*, supra, was cited with approval by the Ohio Supreme Court in *Fulton v. State ex rel. General Motors Corp.* (1936), 130 Ohio St. 494, 498. More recently, it was relied upon in *Elkem Metals Co. L.P. v. Washington Cty. Bd. of Revision* (1998), 81 Ohio St.3d 683.