OHIO BOARD OF TAX APPEALS

ALLTEL Ohio, Inc.,	)	CASE NO. 2004-K-566
	)	
Appellant,	)	(PUBLIC UTILITY PERSONAL PROPERTY TAX)
	)	
vs.	)	
	)	DECISION AND ORDER
William W. Wilkins, Tax Commissioner of Ohio,	)	
	)	
	)	
Appellee.	)	

Western Reserve Telephone Company,	)	CASE NO. 2004-K-567
	)	
Appellant,	)	(PUBLIC UTILITY PERSONAL PROPERTY TAX)
	)	
vs.	)	
	)	
William W. Wilkins, Tax Commissioner of Ohio,	)	
	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellant - Thompson Hine LLP
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For the Appellee - Jim Petro
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Entered June 30, 2005

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

On July 12, 2004,[1] appellants, ALLTEL Ohio, Inc. and Western Reserve Telephone Company, filed notices of appeal with the Board of Tax Appeals through which they challenged final determinations of the Tax Commissioner.[2] Attached to each appeal was a certificate of service indicating that a copy of the appeal had been sent by certified mail, return receipt requested, to the Tax Commissioner on July 8, 2004. However, on November 1, 2004, the commissioner submitted certifications in which he indicated that while he had received notice from this board regarding the docketing of appellants' appeals, he had not received a copy of either appellant's notice of appeal.

Specifically, in BTA No. 2004-K-566, the commissioner certified the following information:

> "The Final Determination issued by the Tax Commissioner on May 13, 2004, regarding the above-referenced Public Utility Property tax case was sent by certified mail, return receipt requested, to the Appellant.
>
> "The Final Determination was received by the Appellant on the 27th day of May 2004 by certified mail.
>
> "The Tax Commissioner received a letter from the Board of Tax Appeals stating that it had received and docketed a notice of appeal from the Final Determination, filed by the Appellant.
>
> "As of the 1st day of November 2004 no copy of said notice of appeal has been filed with the Tax Commissioner.

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[1] Although the envelope in which appellants' appeals were sent to this board reflects a postmark date of July 8, 2004, since ordinary mail was used, the appeals were docketed as having been filed on the date they were received by this board, i.e., July 12, 2004.

[2] Given the common facts, issues, and arguments presented, we find these appeals are appropriately consolidated for purposes of this decision.

"IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department of Taxation of Ohio, this 1st day of November 2004."

A similar certification was filed by the commissioner in BTA No. 2004-K-567:

"The Final Determination issued by the Tax Commissioner on May 21, 2004, regarding the above-referenced Public Utility Property tax case was sent by certified mail, return receipt requested, to the Appellant.

"The Final Determination was received by the Appellant on the 7th day of June 2004 by certified mail.

"The Tax Commissioner received a letter from the Board of Tax Appeals stating that it had received and docketed a notice of appeal from the Final Determination, filed by the Appellant.

"As of the 1st day of November 2004 no copy of said notice of appeal has been filed with the Tax Commissioner.

"IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department of Taxation of Ohio, this 1st day of November 2004."

Based upon these certifications, appellants were ordered to show cause why their appeals should not be dismissed on the basis that they failed to comply with the statutory prerequisites necessary to vest jurisdiction in this board. Given the factual assertions made by appellants in their responses, the parties were accorded an opportunity to supplement the evidentiary record with regard to the jurisdictional issue which had been raised.

R.C. 5717.02 provides the statutory mechanism by which a party may challenge a final determination of the Tax Commissioner, setting forth the threshold

requirements which must be satisfied before this board may consider the merits of an appeal.[3] Pertinent in this instance, the statute provides in part:

> "Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal ***. The notice of appeal shall be filed within sixty days after service of the notice of the *** determination *** by the commissioner ***. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service ***, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing."

Although appellants suggest that the preceding statute be liberally interpreted, the Supreme Court has expressly held otherwise. In *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, the court reviewed the requirements for filing a notice of appeal set forth in G.C. 5611, the predecessor to R.C. 5717.02, holding at paragraph one of the syllabus, that "where a statute confers the right to appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the rights conferred." The court has reaffirmed this position on numerous occasions. See, e.g., *Craftsman Type, Inc. v. Lindley* (1983), 6 Ohio St.3d 82, 85 ("It is axiomatic that when a right to appeal is conferred by legislative enactment, the statute's prescriptions must all be strictly complied with in order to invoke the jurisdiction of the appropriate appellate tribunal."); *Avon Lake*

[3] Although not in issue in these appeals, R.C. 5717.02 also requires parties seeking appellate review to specify the errors claimed to exist in the commissioner's final determination and to attach a copy of the final determination. While the former is an essential element to invoke jurisdiction, see, e.g., *Queen City Valves v. Peck* (1954), 161 Ohio St. 579, and *Gen. Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869,

School Dist. v. Limbach (1988), 35 Ohio St.3d 118, 119 ("A litigant has no inherent right to appeal a tax determination, only a statutory right."). Especially relevant to the issue presented in these appeals, courts have repeatedly held that an appellant must timely file its notice of appeal with the Tax Commissioner, as well as this board, in order to invoke our jurisdiction. See, e.g., *Zephyr Room, Inc. v. Bowers* (1955), 164 Ohio St. 287; *Fineberg v. Kosydar* (1975), 44 Ohio St. 2d 1; *Clippard Instrument v. Lindley* (1977), 50 Ohio St.2d 121; *House of Good Shepherd, Inc. v. Limbach* (1988), 37 Ohio St.3d 244; *Universal Equipment Co. v. Limbach* (Mar. 10, 1989), Sandusky App. No. S-88-20, unreported; *Ross v. Tracy* (Feb. 1, 1999), Stark App. No. 98-CA-00103, unreported.

As initially noted, the certificates of service attached to appellants' notices of appeal represent that copies of their appeals were "mailed by certified mail, return receipt requested," to the Tax Commissioner. However, appellants were unable to provide this board with the return receipts which presumably would have evidenced the method by which delivery was effected and the commissioner's receipt thereof.[4]

In the absence of actual evidence demonstrating service upon the commissioner, appellants ask that this board presume compliance with R.C. 5717.02 based upon appellants' counsel's past practices and the reliability of his secretary in carrying out his instructions. In this regard, Richik Sarkar, the attorney who prepared and signed the notices of appeal, testified that, consistent with his prior practice in filing

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the latter, as expressly stated within the statute, is not. See, generally, *Buckeye Candy & Tobacco Co., Inc. v. Limbach* (1986), 28 Ohio St.3d 40.

[4] We note also that, despite representations to the contrary in their notices of appeal, appellants did not attach copies of the Tax Commissioner's final determinations thereto. Although the failure to attach such

appeals with the board, he instructed his secretary to mail appellants' notices of appeal to both the board and the commissioner by certified mail, in separate envelopes, consistent with the representations made on the certificates of service.

Although we do not question Sarkar's veracity, there are a number of reasons why we accord little weight to his testimony. Sarkar's involvement with the filing of these appeals ended when he gave the notices of appeal to his secretary with instructions for their filing. While he testified that when filing appeals with this board he always instructed his secretary to send notices of appeal to the board and the body from which the appeal was taken by certified mail and that these were instructions issued in this instance, the notices of appeal filed with this board were delivered by ordinary mail. Sarkar also testified that if multiple appeals were to be filed, he would instruct his secretary to send each appeal in its own separate envelope. Once again, contrary to his common practice, the notices of appeal were sent in the same envelope and under a single cover letter.

Although other individuals associated with Sarkar's law firm testified regarding what they assumed occurred in this instance, their testimony is similarly of limited value. James Koenig, a partner in the firm's tax practice group, testified that while he served as the technical resource for appellants' appeals, Sarkar was responsible for handling the filing of the appeals. Sean Martin, the manager of the firm's mailroom

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determinations does not constitute a jurisdictional defect, it provides yet another reason for questioning the representations made within the notices.

operations,[5] testified that no separate log is maintained regarding documents sent by certified mail. Instead, he indicated that returned certified mail receipts are delivered through interoffice mail to the firm employee identified as having sent them. On those occasions when a sender's name is missing, the receipts are placed in an unclaimed file. However, Martin did not testify as to any specific recollection regarding these appeals. Although he reviewed the unclaimed receipts file, he was unable to locate any receipts that could have been attributed to the present appeals.

At this point, we must comment upon the absence of testimony by the individual charged with carrying into effect Sarkar's instructions. Numerous references were made to instructions given to Sarkar's secretary regarding her common practices and the action she was presumed to have taken with respect to these appeals. Although it does not appear she was unavailable to testify as a witness before this board, appellants were nevertheless accorded considerable latitude in the presentation of testimony regarding her presumed conduct. Without her testimony, subject to examination by opposing counsel and this board, we can only speculate regarding the events actually associated with the mailing of these appeals. Compare, e.g., *Consolidated Freightways, Inc. v. Summit Cty. Bd. of Revision* (1986), 21 Ohio St.3d 17.

Instead, we find competent, probative, and reliable the testimony provided by Jodie McMannus, an administrative assistant within the appeals management division of the Department of Taxation. McMannus testified that she is charged with overseeing

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[5] Martin explained that he is the customer operations manager for Pitney Bowes Management Services, a company with which the Cleveland office of Thompson Hine has contracted for providing the manpower and equipment for many of the firm's "back office" functions.

the appeals docketing function for the department. She described the department's practice in tracking appeals, the efforts she undertook to ascertain whether appellants had timely filed notices of appeal with the department, and that, despite an exhaustive search, her inability to locate any such filings.[6]

Citing the fact that almost four months passed between the filing of their appeals and the submission of the commissioner's certifications, appellants also argue they were prejudiced by the commissioner's "delay" in raising the jurisdictional defect existing in these appeals. Appellants claim they were under the impression their appeals had been properly perfected and that the time which elapsed adversely affected their ability to demonstrate compliance with R.C. 5717.02. Initially, we disagree with appellants that the length of time which preceded the filing of the commissioner's certifications was somehow unreasonable. Regardless, however, the Supreme Court has repeatedly held that a party cannot waive subject-matter jurisdiction and that defects impacting a tribunal's ability to consider an appeal can be raised at any time. See, e.g., *Jenkins v. Keller* (1966), 6 Ohio St.2d 122; *In re Claim of King* (1980), 62 Ohio St.2d 87; *Sekerak v. Fairhill Mental Health Ctr.* (1986), 25 Ohio St.3d 38; *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St.3d 14; *VeriFone, Inc. v. Limbach* (1994), 69 Ohio St.3d 699; *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision* (1997), 78 Ohio St. 3d 459. See, also, *Davison v. Rini* (1996), 115 Ohio App. 3d 688 (holding that where parties fail

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[6] Appellants suggested that the department may have confused appellants' current notices of appeal with appeals previously filed on their behalf and subsequently voluntarily dismissed. See *ALLTEL Ohio, Inc. v. Zaino* (July 23, 2004), BTA No. 2003-K-1420, unreported; *Western Reserve Tel. Co. v. Zaino* (July 23, 2004), BTA No. 2003-K-1421, unreported. However, aside from this suggestion, no evidence was presented which would support such a finding.

to raise a jurisdictional defect, it is incumbent upon the tribunal to raise the issue sua sponte). Accordingly, we reject appellants' arguments in this regard.

Based upon the foregoing, we find that appellants failed to invoke this board's jurisdiction by filing their notices of appeal in the manner prescribed by R.C. 5717.02. Accordingly, it is the order of this board that these appeals must be, and hereby, are, dismissed.

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