

**OHIO BOARD OF TAX APPEALS**

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|--------------------------------------|---|------------------------|
| Ryan Investments,                    | ) |                        |
|                                      | ) |                        |
| Appellant,                           | ) | CASE NO. 2005-A-305    |
|                                      | ) |                        |
| vs.                                  | ) | (PERSONAL PROPERTY TAX |
|                                      | ) | PENALTY ABATEMENT)     |
|                                      | ) |                        |
| William W. Wilkins, Tax Commissioner | ) |                        |
| of Ohio,                             | ) | DECISION AND ORDER     |
|                                      | ) |                        |
| Appellee.                            | ) |                        |

APPEARANCES:

|                              |   |   |
|------------------------------|---|---|
| For the Appellant            | - | NO APPEARANCE<br>Ryan Investments<br>P.O. Box 33684<br>North Royalton, Ohio 44133   |
| Notice of Appeal<br>Filed By | - | Michael R. Lee, CPA<br>Levin, Swedler & Company, Inc.<br>3501 Embassy Parkway, Suite 200<br>Akron, Ohio 44333   |
| For the Appellee             | - | Jim Petro<br>Attorney General of Ohio<br>Janyce C. Katz<br>Assistant Attorney General<br>State Office Tower<br>30 East Broad Street, 16 <sup>th</sup> Floor<br>Columbus, Ohio 43215 |

Entered September 9, 2005

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap 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 appellant from a final determination of the Tax Commissioner. Therein, the Tax Commissioner affirmed the 15% late filing penalty assessed against appellant for failure to file its 2003 personal property tax return in a timely fashion. The commissioner determined that the appellant's "request for penalty abatement is not well taken in that the return was filed after the due date without reasonable cause; and the records disclose that the taxpayer has not filed the 2002 New Taxpayer return, thus failing to report the personal property used in business as of the first day of business operations, as required by R.C. 5711.04." S.T. at 1.

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 of the hearing date, no one appeared on behalf of the appellant.

In reviewing appellant's 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 appellant's contentions, as set forth in the notice of appeal, wherein appellant's accountant indicates, in pertinent part, that:

"The taxpayer respectfully appeals the final determination letter dated February 1, 2005 due to misstatement of facts for the above referenced matter.

"The original tax return for the above taxpayer was filed on time, April 1, 2003, and showed no tax due. The next filing season the taxpayer switched CPA firms. The new firm found that the old firm had not properly filed the 2003 return. The new firm supervised the old firm in correcting the 2003 return and this corrected return was filed as an 'amended' return on April 9, 2004. The new CPA firm also filed a Form 920NT for 2002 to report activity for the tax year of inception.

"It appears that the Tax Commissioner has taken the amended return and treated it as an originally filed return, whereas the original 2003 return was filed timely by April 30, 2003. The new CPA firm found error in that originally filed return and supervised the filing of the amended return in April of 2004 as well as filing a Form 920NT for tax year 2002.

"Based on the above facts, we respectfully request all penalties and interest be abated.

Appellant filed its petition for abatement of personal property tax penalties pursuant to R.C. 5711.28, which provides in pertinent part that:

"Within sixty days after the mailing of the notice of a penalty assessment \*\*\*, the taxpayer may file with the tax commissioner, in person or by certified mail, a petition for abatement of such penalty assessment. \*\*\*

“\*\*\* The commissioner shall review the petition without the need for hearing. If it appears that the failure of the taxpayer to timely return or list was due to reasonable cause and not willful neglect, the commissioner may abate in whole or in part the penalty assessment. \*\*\*”

We acknowledge that appellant’s CPA has disputed the facts of this matter as they are set forth in the final determination by the Tax Commissioner. While information contained in the statutory transcript would seem to support the CPA’s position that the tax return filed on March 16, 2004, was an amended 2003 return, the statutory transcript also indicates that the original 2003 return was filed on October 16, 2003, several months after the April 30, 2003 due date. S.T. at 4, 12. Therefore, contrary to the CPA’s contentions, the original 2003 return was not filed in a timely manner.

The information contained in the statutory transcript indicates that the subject personal property tax return was due on or before April 30, 2003, but, according to the commissioner’s final determination, was “filed with the Cuyahoga County Auditor’s office on March 16, 2004.” S.T. at 1. Based upon this late filing, a penalty of 15% was assessed and mailed to the taxpayer on April 9, 2004. Thereafter, appellant filed a petition for abatement of the late filing penalties, explaining that it had “purchased Hedgewood Manor Apartments in October 2002. Unfortunately our tax preparer failed to prepare the personal tax form or tell us that it was required. In the future, we will always file in a timely manner.” S.T. at 1.

In R.C. 5711.28, the General Assembly delegated the task of reviewing petitions for abatement to the Tax Commissioner. “The remission of a penalty under

this provision is discretionary with the Tax Commissioner and cannot be reversed by the Board of Tax Appeals unless an abuse of discretion is demonstrated.” *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29; quoting from *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483, 485 [11 O.O. 2d 240]. Thus, this board’s duty in the instant matter is limited to a determination of whether the Tax Commissioner abused his discretion in denying abatement of the subject penalty, i.e., a determination of whether the commissioner’s decision was “unreasonable, arbitrary or unconscionable.” *Jennings and Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70. See, also, *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83.

We first note that this board has on numerous occasions held that “[F]ailure to comply with a basic statutory obligation is not excused simply by the assignment or delegation of a portion of the responsibility therefor” to an accountant. *Transcon, Inc. v. Limbach* (Apr. 26, 1991), BTA No. 1989-F-697, unreported. See, also, *Sorrentino’s Boots Britches, Inc. v. Tracy* (Dec. 17, 1993), BTA No. 1993-K-466, unreported; *OKA Vending & Coffee Service, Inc. v. Tracy* (Nov. 5, 1993), BTA No. 1993-B-165, unreported. We also note that without an appearance before this board by the appellant or its CPA, we are unable to further clarify the factual discrepancy presented by the notice of appeal. Thus, based upon the foregoing, we find that the record before us supports the commissioner’s finding that the original 2003 return was not filed in a timely manner. As such, the record contains insufficient evidence to support a claim of abuse of discretion on the part of the commissioner in denying abatement of the penalty in question. Accordingly, this board finds that the Tax

Commissioner's findings were reasonable and lawful. It is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed.

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