

OHIO BOARD OF TAX APPEALS

Sines Enterprises, Inc.,)
)
 Appellant,)
)
 vs.) (PERSONAL PROPERTY TAX
) PENALTY ABATEMENT)
)
 William W. Wilkins,)
 Tax Commissioner of Ohio,) DECISION AND ORDER
)
)
 Appellee.)

APPEARANCES:

For the Appellant - No Appearance
Sines Enterprises, Inc.
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Appeal Filed By - Thomas D. Sines, President
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Entered June 17, 2005

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed on behalf of Sines Enterprises, Inc. (“Sines”). Sines appeals a final determination of the Tax Commissioner, in which the commissioner denied its petition for abatement of a late filing penalty concerning the business’ 2004 personal property tax return.

Upon review, the Tax Commissioner found that the assessment of the personal property tax late filing penalty was justified due to the absence of reasonable cause for the late filing on the part of the taxpayer. Sines now appeals the commissioner's final determination to this board.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to the board by the Tax Commissioner, and the record of the evidentiary hearing ("H.R.") before this board. The Tax Commissioner appeared and was represented by counsel. Despite due notice, the appellant did not appear.

Sines' 2004 personal property tax return was due by the extended due date of June 15, 2004. However, the Wayne County Auditor's office did not receive the return until June 17, 2004. In accordance with R.C. 5711.27, Sines was assessed a penalty of ten percent of the listed value.

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 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(A) sets forth the time for making such returns, stating:

“*** [R]eturns 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 a return to the fifteenth day of June. ***”

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:

“No taxpayer shall fail to make a return within the time prescribed by law, or as extended pursuant to section 5711.04 of the Revised Code, nor fail to list in a return or disclose on an accompanying balance sheet or in other information filed with the return any item of taxable property the taxpayer is required to list in the return under sections 5711.01 to 5711.36 of the Revised Code.

“If any taxpayer fails to make a timely return, or fails to list or disclose any item the taxpayer is required to return, the assessor shall add to the assessment of each class or item of taxable property the taxpayer failed to return, list, or disclose a penalty of up to fifty per cent of the assessment; 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 the taxpayer is required by such sections to list, and in all cases in which the taxpayer’s only default is the 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, and, if the assessment certificate has been issued, an amended assessment certificate shall be issued and substituted therefor.

“The penalty 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. ***.”

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 should not reverse the Tax Commissioner’s decision unless the commissioner’s 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. ***”

Sines asserts that it physically delivered the return to the U.S. Postal Service on June 15, 2004, but that the letter was not postmarked until the next day due to a service failure by the postal service. In the present case, however, the record supports the Tax

Commissioner's determination that appellant's personal property tax return for 2004 was not timely filed by the extended due date. Sines has not come forward with any competent, probative, and reliable evidence to support its contention and therefore provides no basis for remission of the penalty. While we are sympathetic to the appellant's situation, Sines failed to provide any evidence to show that the Tax Commissioner acted unreasonably, arbitrarily or unconscionably in failing to abate the penalties assessed.

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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