

Hickory Farms, Inc.,	)	
	)	
Appellant,	)	CASE NO. 96-P-1741
	)	
vs.	)	(USE TAX)
	)	
Roger W. Tracy,	)	DECISION AND ORDER
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellant	-	Brian J. Hoch Balk, Hess and Miller Charter One Bank Building 5744 Southwyck Boulevard Toledo, Ohio 43614
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215

Entered: July 17, 1998

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

Hickory Farms, Inc. appeals a final determination in which the tax commissioner determined that it failed to file its petition for reassessment within the thirty day time frame established in R.C. 5739.13(B). Hickory Farms **admits** it filed late. Nevertheless, it argues in its brief: (1) there was "substantial compliance" with R.C. 5739.13(B); (2) the employee it assigned to represent it was unqualified - - - so as to constitute "excusable neglect;" (3) Civil Rule 60(B) relief should be granted; and (4) "[t]he board should adopt some procedure to expeditiously

deal with cases similar to Appellants \* \* \* ." But, none of these issues are specified as error in Hickory Farms' notice of appeal.

Hickory Farms' notice of appeal states:

"Hickory Farms, Inc. is appealing the assessment of the Sales and Use Tax Audit number 96001083 U, for account number 97-125492, for the following reasons:

"We request that the penalty be waived because there was no fraudulent intent to not pay the use tax on the invoices in question.

"The amount of tax due in the 9150-564000 account in county 48 is incorrect because the tax was included in the lease payments as documented in the attached lease documentation. This would lower the tax liability in that account and the interest.

"Based on these reasons, Hickory Farms, Inc. is appealing the Sales and Use Tax Audit number 96001083 U for account number 97-125492. A spreadsheet explaining our payment is enclosed along with a copy of the canceled check number 316667 to pay the tax we believed we owed to the state of Ohio, and the original petition for reassessment."

It is well established that a notice of appeal must specify error to confer jurisdiction. Moraine Hgts. Baptist Church v. Kinney (1984), 12 Ohio St. 3d 134, 138, Osborne Brothers Welding Supply v. Limbach (1988), 40 Ohio St. 3d 175, Cleveland Elec. Illum. Co. v. Lindley (1982), 69 Ohio St. 2d 71, 75, Lenart v. Lindley (1980), 61 Ohio St. 2d 110, Gochneaur v. Kosydar (1976), 46 Ohio St. 2d 59, Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579. Hickory Farms has failed to specify the matters argued in its brief. Therefore, we do not have jurisdiction to consider them.

We turn now to the final determination. R.C. 5739.13(B) provides that a petition for reassessment must be filed within thirty days after service of the notice of assessment:

"Unless the party to whom the notice of assessment is directed files with the commissioner within thirty days after service of the notice of assessment, either personally or by certified mail, a petition for reassessment in writing, signed by the party assessed or by his authorized agent having knowledge of the facts, the assessment shall become conclusive and the amount of the assessment shall be due and payable from the party assessed to the treasurer of state." (Emphasis added.)

The tax commissioner has made a specific finding that Hickory Farms failed to file its petition within the thirty day time limit:

"The petition for reassessment was not filed within thirty days after the receipt of the notice of assessment, as required by Section 5739.13 of the Ohio Revised Code. Therefore, the Tax Commissioner is without jurisdiction to consider the petition." Final Determination. (Emphasis added.)

The tax commissioner's findings are presumed valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121. It is incumbent upon Hickory Farms 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. Hickory Farms is assigned the burden of showing in what manner and to what extent the tax commissioner's final determination is in error. Federated Department Stores v. Lindley (1983), 5 Ohio St. 3d 213.

The tax commissioner has no power to act unless jurisdictional prerequisites are met. Any action taken without jurisdiction would be null and void:

"Administrative officers and agencies have no common-law or inherent powers other than as have been granted to or conferred on them by law. As a creature of statute, it is without power to exercise any jurisdiction beyond that conferred by statute. The applicable sections of the Revised Code set out above are statutory, jurisdictional prerequisites as to the time for doing an act, and without compliance therewith the administrative agency is without power or authority. The jurisdiction of such officials and tribunals must be invoked in the manner prescribed by statute, and their proceedings must be in accordance with valid statutory requirements. They are authorized to act only in the mode prescribed by statute and cannot dispense with essential forms of procedure which condition their statutory powers, or have been prescribed for the purpose of investing them with power to act." Leiphart Lincoln-Mercury, Inc. v. Bowers (1958), 107 Ohio App. 259, 264 to 266.

The Ohio Supreme Court has held:

"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 imposed is essential to the enjoyment of the right conferred. The party who seeks to exercise this right, must comply with whatever

terms the statute of the state impose upon him as conditions to its enjoyment."

American Restaurant and Lunch Co. v. Glander, Tax Comm. (1946), 147 Ohio St. 147. (Emphasis added.)

Hickory Farms' failure to file its petition for reassessment within thirty days after service deprived the tax commissioner of jurisdiction over this matter. As a result the tax commissioner, and in turn ourselves, lack jurisdiction over this appeal.

C O N C L U S I O N:

Hickory Farms does not show how the tax commissioner's final determination is in error. Federated Department Stores v. Lindley, supra. Indeed, Hickory Farms admits it filed its petition beyond the statutorily mandated time limit. R.C. 5739.13(B). Although we sympathize with Hickory Farms' circumstance, the fact remains: the tax commissioner was without jurisdiction.

Accordingly, the final determination of the tax commissioner, as set forth in his journal entry dated the 7th day of November, 1996, must be, and the same hereby is **AFFIRMED**. ohiosearchkeybta