

A. James Sniderman, M.D., Inc.,))	
)	
Appellant,)	CASE NO. 97-B-899
)	
vs.)	
)	(PERSONAL PROPERTY TAX)
Roger W. Tracy,)	
Tax Commissioner of Ohio,)	
)	DECISION AND ORDER
Appellee.)	

APPEARANCES:

For the Appellant - A. James Sniderman, M.D., Inc.
2600 Far Hills Avenue
Dayton, Ohio 45419-1602

For the Appellee - Betty D. Montgomery
Attorney General of Ohio
By: Richard C. Farrin
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Entered July 17, 1998

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

This appeal is considered by the Board of Tax Appeals pursuant to a notice of appeal filed herein on August 4, 1997 on behalf of the above-named appellant. The appeal is taken from a final determination of the Tax Commissioner (appellee herein), wherein said official determined that he was without jurisdiction to consider appellant's petition for abatement of penalty, as such

petition was not timely filed as required by R.C. 5711.28. Said determination reads, as follows:

"Section 5711.27, Ohio Revised Code, provides that if a personal property tax return is not filed within the dates required by O.R.C. 5711.04, there shall be assessed a penalty of one-half of the value exempted under O.R.C. 5709.01(C)(3) and an additional penalty of up to 50% of the remaining listed value. In this instance, the return was required to be filed by April 30, 1995, but was filed with and received by the Tax Commissioner on October 7, 1996. A penalty of a forfeiture of one-half of the exempted value and 10% of the remaining listed value was assessed on November 22, 1996, and mailed to the taxpayer on that date.

"The representative for the taxpayer filed a Petition for Abatement of Penalty dated May 15, 1997, postmarked May 16, 1997, and received by the Tax Commissioner on May 20, 1997.

"O.R.C. 5711.28 provides that a taxpayer may file with the Tax Commissioner, in person or by certified mail, a Petition for Abatement of Penalty within thirty days after the mailing of the notice of penalty assessment. The Petition shall have attached to it a copy of the notice of assessment, shall indicate that the taxpayer's only objection is to the assessed penalty and shall state the reason for the objection. The Board of Tax Appeals, in its decision Straffon Desktop Production v. Roger W. Tracy decided April 23, 1993 states:

'The thirty-day requirement under R.C. 5711.28 is mandatory. Unless the assessed party complies fully with the requirements set forth in the statute, the Tax Commissioner has no jurisdiction or authority to address the merits of the case and must dismiss the cause on jurisdictional grounds.'

"In this case, the Tax Commissioner finds that the representative's letter, which was considered upon receipt as a Petition for

Abatement of Penalty, is deficient since it does not meet all the requirements of O.R.C. 5711.28 in that it was received by the Tax Commissioner more than five (5) months after the assessment notice was mailed to the taxpayer.

"Therefore, the Tax Commissioner does not have jurisdiction to consider this petition."

The appellant's notice of appeal reads as follows:

"In regards to the above named taxpayer and the delinquent tax bill, please restore the disallowed exemption and abate any proposed penalties. The taxpayer was an incorporated doctor who died in early June of this year. The corporation will be dissolved. The copy of the 1995 tax return indicates a timely date of 3/14/95. Due to the exemption, there was not any tax due, thus there is not a canceled check to prove timely filing. The taxpayer is current on all taxes and has a timely filing and payment record."

An evidentiary hearing before this Board was waived by the parties. Accordingly, this matter is submitted to the Board of Tax Appeals upon the above-quoted notice of appeal, and the statutory transcript certified to this Board by the Tax Commissioner pursuant to R.C. 5717.02.

Initially, we recognize the general proposition that the findings of the Tax Commissioner are presumptively valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121; Wheeling Steel Corp. v. Evatt (1944), 143 Ohio St. 71. In addition, it is rebuttably presumed that the action of the Tax Commissioner was performed in good faith and in the exercise of sound judgement. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut these presumptions 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), 28 Ohio St. 2d 69; National Tube Co. v. Glander (1952), 157 Ohio St. 407. 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 Department Stores, Inc. v. Lindley (1983), 5 Ohio St. 3d 213.

Every taxpayer owning personal property must annually file a personal property tax return with the county auditor of each county where such property is located. R.C. 5711.02. Further, R.C. 5711.04 sets forth the time for making such returns, stating:

"Returns shall be made, annually, between the fifteenth day of February and the thirtieth day of April; ***."

In the event that a personal property tax return is not timely filed in accordance with R.C. 5711.04, R.C. 5711.27 requires that the following penalties be assessed:

"(A) In the case of a taxpayer who fails to make a timely return, the assessor shall add to the taxpayer's assessment as a penalty, one-half of the taxpayer's taxable value that is exempt from taxation under division (C)(3) of section 5709.01 of the Revised Code. ***.

"(B) In the case of a taxpayer who failed to make a timely return, ***, the assessor shall add to the assessment of each class or item of taxable property which the taxpayer failed to return, list or disclose and to any amount added under division (A) of this section, a penalty of up to fifty per cent thereof; ***.

"*** ** *

"Either or both of the penalties 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. *** ."

Furthermore, R.C. 5711.28 provides that penalties can be abated if the late filing was brought about by reasonable cause and in the absence of willful neglect. That section further provides:

"Within thirty 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."

The thirty-day requirement under R.C. 5711.28 is mandatory. Unless the assessed party complies fully with the requirements set forth in the statute, the Tax Commissioner has no authority to address the merits of the case and must dismiss the cause on jurisdictional grounds. See Daiquiri Club, Inc. v. Peck (1953), 159 Ohio St. 52.

In the present case, the preliminary assessment certificate issued as to the 1995 Personal Property Tax Returns is dated November 22, 1996. (ST. 11) The appellant's petition for abatement was received by the Tax Commissioner on May 20, 1997. (ST. 5) This is approximately five months after the mandatory filing date. The appellant did not present any evidence to prove that the petition for abatement was filed within the required thirty days after mailing of the preliminary assessment certificates.

Accordingly, we are constrained to find that appellant has failed to satisfy the legal requirement of demonstrating the Tax Commissioner erred in refusing to entertain the merits of appellant's petition for abatement on jurisdictional grounds.

Accordingly, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed. ohiosearchkeybta