

South Street Carryout, Inc.)	CASE NO. 97-M-706
dba Chucks Steakhouse)	
)	(PENALTY REMISSION)
Appellant,)	
)	DECISION AND ORDER
vs.)	
)	
Roger W. Tracy,))	
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	Habiba Hajjar, President South Street Carryout, Inc. DBA Chucks Steakhouse 460 E. South Street Akron, Ohio 44311
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General State Office Tower 30 East Broad Street 16th Floor Columbus, Ohio 43215

Entered July 17, 1998

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

This cause and matter comes on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by appellant on June 30, 1997. Appellant appeals from a final determination issued by the Tax Commissioner, appellee herein, wherein the Commissioner denied a request for abatement of penalties levied against the appellant for the late filing of a personal property tax return.

The notice of appeal provides the following:

"This notice of appeal is in response to your Final Determination letter dated June 4, 1997 (attached).

"In April of 1996, we filed for an extension with Summit County regarding our 1996 Personal Property Tax return. In March of 1996, we also filed for a Federal Income Tax extension. **Before June 14, 1996, we did file a tentative Personal Property Tax return with Summit County.**¹ There was no tax due. In September of 1996, when we had completed our 1995 Federal Income tax return, we also filed an amended Personal Property Tax return. The total listed property was 7,400. No tax was due.

"We then received your Preliminary Assessment Certificate of Evaluation dated December 6, 1996. We knew we had filed the 1995 information in a timely manner and that no tax was due. As soon as we were able, we wrote you a letter (January 23, 1997). Unfortunately, our appeal was not within the thirty day allowance. We then sent a letter of apology and penalty abatement dated February 17, 1997.

"We are appealing because we do not understand why you reduced our 10,000 exemption. We feel we followed correct and timely procedures by **filing a tentative return in June**, and then an amended return when the information was available to complete your 1996 Report.

"We are very sorry that we did not appeal within the thirty days. We ask that you please abate the penalties associated with our 1996 Return of Taxable Business Property. We will be very careful in the future should we ever receive any correspondence from you."

¹Although not relevant or material to our ultimate finding in this appeal, we note that the record does not support appellant's assertion that its 1996 personal property report was timely filed. The Statutory Transcript contains only one return, date stamped October 31, 1996 by the Summit County Auditor. (S.T. p.21) While the October, 1996 return was marked "Amended Return", no other return is included in the Statutory Transcript, nor presented by the appellant.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal and the Statutory Transcript furnished by the Tax Commissioner. Although a hearing was scheduled, appellant's representative informed this Board that he had no further evidence or testimony to present. Appellee, Tax Commissioner, similarly, waived hearing.

Appellant questions the penalties imposed, claiming that its 1996 personal property tax return was timely filed. However, the Commissioner did not rule upon the timely filing of the tax return. Instead, the Commissioner dismissed the penalty abatement request filed with him because he determined that the petition was filed outside the time limitations imposed by R.C. 5711.28.

This matter arose when the Tax Commissioner imposed a late filing penalty of 10 per cent and loss of one-half the maximum allowable exemption after notice that the property tax return was filed October 31, 1996. (S.T. p. 28) The penalties were imposed, pursuant to R.C. 5711.27(A), which requires taxpayers to file personal property returns "within the time prescribed by law."

If a taxpayer disputes the penalties imposed, R.C. 5711.28 provides the mechanism by which the penalties may be questioned. That section requires a taxpayer to request abatement of penalty within thirty days of the mailing of the preliminary assessment. R.C. 5711.28 provides, in pertinent part:

"Within thirty days after the mailing of the notice of 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. If the petition is filed by certified mail, the date of the United States

postmark placed on the sender's receipt by the postal employee to whom the petition is presented shall be treated as the date of filing. *** "

The appellant responded to the penalty assessment by submitting a letter to the Tax Commissioner requesting abatement of the penalty, explaining that it had timely filed a return with Summit County by June 14, 1996. The report the Commissioner identified as the late filing, according to the appellant, was actually a revision filed after its income tax return was prepared. However, the letter prepared by the appellant was not received by the Tax Commissioner until January 27, 1997. (S.T. p. 3)

When the Tax Commissioner received the abatement request, he once again wrote the appellant, explaining that the request was filed more than thirty days after the penalty assessment and requesting some justification for the late filing. (S.T. p. 16) To that request, the appellant responded:

"We apologize for the tardiness of our previous letter, the petition for abatement of penalty. The 30-day requirement was not met because the Preliminary Assessment was sent between Holidays and business was hectic. The Assessment was caught up in our paperwork and was answered as soon as possible. Because we knew that we had filed our tentative and amended returns timely, we felt this penalty would be waived. We apologize for this misunderstanding."

After receiving appellant's response, the Commissioner issued his final determination, wherein he found that he was without jurisdiction to consider appellant's abatement request because the request was filed outside the time period allotted by statute.

We first acknowledge that the Tax Commissioner's determinations are accorded a presumption of correctness. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St.3d 121. Further, the taxpayer must provide evidence of the manner and extent of the error made on the part of the Commissioner. Belgrade Gardens, Inc. v. Kosydar (1974), 38 Ohio St.2d 135.

While the appellant makes a substantive claim regarding the timeliness of the filing of its tax report, this Board concludes that the appellant did not properly bring its claim before the Commissioner. Compliance with R.C. 5711.28 must first be met before the Commissioner has the necessary jurisdiction to consider a petition for abatement of penalty. Classic Organ Installation v. Tracy (Dec. 18, 1992), B.T.A. No. 91-K-1402, unreported. Therefore, this Board's first obligation is to determine if the appellant's request for abatement of penalty was timely filed.

A review of the record before us reveals that the request was not timely made. The appellant concedes as much through its notice of appeal and its response letter, quoted above, in which it acknowledges receipt of the penalty assessment as well as its failure to respond to that assessment within thirty days. That acknowledgement, while not made under oath, is sufficient to support the Commissioner's finding that the petition for abatement was filed outside the time prescribed by law. D-Team Cleaning, Inc. v. Tracy (Feb. 11, 1994), B.T.A. No. 92-M-986, unreported.

Therefore, this Board finds that the Tax Commissioner was correct when he determined he was without jurisdiction to

consider the abatement request, as the request was not timely made. D-Team Cleaning, Inc.; C & C Industrial Service, Inc. v. Limbach (June 12, 1992), B.T.A. No. 90-J-1610, unreported; Seafood Restaurant, Inc. v. Limbach (Jan. 25, 1991), B.T.A. No. 89-B-317, unreported. Where the Commissioner is without jurisdiction to address the underlying merits of a cause or matter due to a jurisdictional defect, this Board is correspondingly limited to a consideration of whether the Commissioner's determination was correct.

Therefore, given consideration to the notice of appeal, the record in this matter, the case law and the findings of this Board, it is the finding of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.