

Insulating Materials,)	
Incorporated,)	
)	
Appellant,)	CASE NO. 97-P-845
)	
vs.)	(PERSONAL PROPERTY TAX)
)	
Roger W. Tracy,)	DECISION AND ORDER
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	Jurg Brunner Vice President Insulating Materials, Incorporated One West Campbell Road Schenectady, New York 12306
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Phyllis Shambaugh 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.

This matter is before us upon a notice of appeal filed on the 22nd day of July, 1997, in accordance with the provisions of R.C. 5717.02. Insulating Materials, Incorporated appeals a final determination of the tax commissioner which denies its petition for abatement of late filing penalties assessed against its 1995 personal property tax return. Appellant waived hearing by its correspondence filed with us on July 10, 1998. This matter is submitted upon the record which consists of the notice of appeal and the statutory transcript filed by the tax commissioner in

accordance with the provisions of R.C. 5717.02. No briefs have been filed.

The tax commissioner's final determination states:

"This matter now comes on for final determination. It involves a petition pursuant to Section 5711.28 of the Ohio Revised Code (R.C.) for abatement of a personal property tax late filing penalty assessment.

"R.C. 5711.27 provides that if the return is not filed within the dates required by R.C. 5711.04, there shall be assessed to the return a penalty of up to 50% and a penalty of one-half of the \$10,000 list value otherwise exempt under R.C. 5709.01(C)(3). In this instance, the return was due by April 30, 1995, but was not filed until February 4, 1997; and therefore were assessed penalties of 10% and one-half the remaining list value.

"The assessee filed a petition requesting abatement of the above penalties, explaining that the late filing was due to the fact that on March 15, 1995, the corporation was acquired by Von Roll America, Inc. At the time of the acquisition, the previous owners represented to the new owners that all required tax returns had been filed and all taxes paid, including the 1995 Coshocton County property tax.

"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. In this instance, the Tax Commissioner finds the petitioner's request is not well taken in that the return was filed after the due date without reasonable cause; and the record discloses that the assessee has had previous delinquencies. Therefore, the subject assessment shall stand as made.

"THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON EXPIRATION OF THE THIRTY DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, NOTICE OF SUCH FINAL DETERMINATION WILL BE SENT TO THE APPROPRIATE COUNTY AUDITOR, WHO

SHALL PROCEED IN ACCORDANCE WITH
R.C. 5711.32(C)."

Appellant's notice of appeal asserts:

"This letter is in response to the attached final determination from the Ohio Tax Commissioner. We respectfully request that the penalty of \$4,998.82 assessed on the above referenced corporation's 1995 Personal Property Tax for Coshocton County be abated due to reasonable cause for the reasons outlined below.

"On March 15, 1995, the above referenced corporation was acquired by Von Roll America, Inc. At the time of the acquisition, the previous owners represented to us that all required tax returns had been filed and all taxes had been paid, including the 1995 Coshocton County property tax. We were unaware that the 1995 Personal Property Tax Return had not been filed until we received a notice from the Ohio Department of Taxation.

"Due to the previous owner's representations to us regarding the filing of the personal property tax return and payment of tax, it was our belief that the 1995 tax liability had been satisfied. Since the acquisition, we have filed all appropriate Ohio Personal Property Tax Returns on time and have paid all tax liabilities associated with the tax returns.

"The Tax Commissioner's Final Determination states that the records disclose that the assessee has had previous delinquencies. Please note that these delinquencies that the Tax Commissioner alludes to were the result of the previous owners untimely filings of 1992 through 1995 tax returns. As noted above, subsequent to Insulating Materials Incorporated being acquired by Von Roll America, all Ohio Personal Property Tax Returns have been filed on time. We acknowledge that the 1996 Coshocton County Property Tax Return did have the incorrect amount of tax computed when it was originally, timely filed, however, as soon as the error was brought to our attention, we immediately corrected the error and provided

the Coshocton County a check for the amount of underpayment resulting from the error.

"Based upon the foregoing, we believe reasonable cause exists such that penalties should not be imposed. We respectfully request that you reverse the Tax Commissioner's Final Determination and abate the \$4,998.82 of penalties imposed by the Ohio Department of Taxation on Insulating Materials Incorporated's 1995 Personal Property Tax Return.

"Thank you for your consideration. If you should have any questions, please call me at _____ (telephone number omitted.)"

We begin by observing that the findings of the tax commissioner are presumptively valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121. It is incumbent upon a taxpayer challenging a finding of the tax commissioner 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. 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 v. Lindley (1983), 5 Ohio St. 3d 213.

The General Assembly delegated the task of reviewing petitions for abatement to the tax commissioner:

"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." R.C. 5711.28. (Emphasis added.)

The Supreme Court held similar language vests

"discretionary power" in 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. Interstate Motor Freight System v. Bowers (1960), 170 Ohio St. 483, 485 [11 O.O. 2d 240]. In that case the court held that it was unlawful for the Board of Tax Appeals to order the remission of a penalty where it had not made a specific finding that the Tax Commissioner had abused his discretion." Frankelite Co. v. Lindley (1986), 28 Ohio St. 3d 29. (Emphasis added.)

We may not reverse unless we find the tax commissioner

"abused his discretion:"

"Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. Interstate Motor Freight System v. Bowers (1960), 170 Ohio St. 483, 485 [11 O.O. 2d 240]. An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable." Jennings and Churella Construction Co. v. Lindley (1984), 10 Ohio St. 3d 67, 70. (Emphasis added.)

The Supreme Court held in Huffman v. Hair Surgeon, Inc.

(1985), 19 Ohio St. 3d 83:

"(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 defiance thereof, not the exercise of reason but rather of passion or bias."
(Emphasis added.)

It is incumbent upon appellant to provide us with proof the tax commissioner has not performed his duty properly:

"The action of a public officer, or of a board, within the limits of the jurisdiction conferred by law, is not only presumed to be valid but it is also presumed to be in good faith and in the exercise of sound judgment."

and

"In the absence of proof to the contrary, there is a very strong presumption embodied in the maxim 'omnia praesumuntur rite esse acta,' that public officers have properly discharged the duties of their office and performed faithfully those matters with which they are charged." Wheeling Steel Corp. v. Evatt (1944), 143 Ohio St. 71, 84, 85.
(Emphasis added.)

Appellant offers us no evidence that the tax commissioner **abused his discretion**. At best, appellant's notice of appeal establishes that appellant disagrees with the tax commissioner's decision. It is not our proper function to reverse the tax commissioner without evidence he abused his discretion. The General Assembly has delegated the decision making power over penalty abatement to him. Because appellant has failed to offer evidence of abuse of discretion, the final determination of the tax commissioner must be affirmed.

Accordingly, the final determination of the tax commissioner, as set forth in his journal entry dated the 23rd day of June, 1997, must be, and the same hereby is, **AFFIRMED**.

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