

OHIO BOARD OF TAX APPEALS

Mary Joy Frey,	)	
	)	CASE NO. 99-T-518
Appellant,	)	
	)	
vs.	)	(PENALTY REMISSION)
	)	
James J. Lawrence, Tax	)	
Commissioner of Ohio,	)	DECISION AND ORDER
	)	
Appellee.	)	

APPEARANCES:

For the Appellant -	Mary Joy Frey, <i>pro se</i> 4270 Paul Road # 5 Cincinnati, Ohio 45238-5867
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For the Appellee -	Betty D. Montgomery Attorney General of Ohio By: Phyllis J. Shambaugh Assistant Attorney General Taxation Section State Office Tower, 16 <sup>th</sup> Floor 30 East Broad Street Columbus, Ohio 43215
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ENTERED: August 6, 1999  
Mr. Johnson, Ms. Jackson, and Mr. Manoranjan concur.

This matter is before the Board of Tax Appeals pursuant to a notice of appeal filed under date of April 30, 1999, by Mary Joy Frey. Ms. Frey appeals the Tax Commissioner's denial of her application for the remission of real property tax penalties. The Board of Tax Appeals now considers this matter upon the notice of appeal, the

statutory transcript certified to the Board by the Tax Commissioner, and the record of the evidentiary hearing. Ms. Frey waived an appearance at this hearing. The Commissioner was represented by counsel, who moved the Board to affirm the Commissioner upon the record.

According to the record, real property taxes for the subject period were due to be paid with the Hamilton County Treasurer on or before February 2, 1998. However, the Treasurer did not receive payment until September 4, 1998. Consistent with the applicable provisions of R.C. 323.121, the Treasurer assessed a penalty of ten percent against Ms. Frey for the late payment of the tax. This penalty is in the amount of \$39.38. Ms. Frey claims in her notice of appeal that the late payment was the result of a mistake made by the Treasurer's office. Specifically, Ms. Frey states that she did not receive a tax bill.

R.C. 5715.39 governs the instances in which the Tax Commissioner may remit a penalty imposed for the failure to timely pay real property taxes and provides, in pertinent part:

"The commissioner, on application by a taxpayer, shall remit a penalty for the late payment of any real property taxes when:

"(A) The taxpayer could not make a timely payment of the tax because of the negligence or error of the auditor or treasurer in the performance of a statutory duty relating to the levy or collection of such tax.

"(B) In cases other than those described in division (A) of this section, the taxpayer failed to receive a tax bill or a correct tax bill, and the taxpayer made a good faith effort to

obtain such bill within thirty days after the last day for such payment of taxes.

"(C) The tax was not timely paid because of the death or serious injury of the taxpayer, or his confinement in a hospital within sixty days preceding the last day for payment of the tax, if, within any case, the tax was subsequently paid within sixty days after the last day for payment of such tax.

"(D) The taxpayer demonstrates to the satisfaction of the commissioner that the full payment was properly deposited in the mail in sufficient time for the envelope to be postmarked by the postal service on or before the last day for payment of such tax.

"The commissioner shall consider the application, determine whether the penalty should be remitted, and certify his determination to the taxpayer, to the county treasurer, and to the county auditor, who shall correct the tax list accordingly."

Under the foregoing statute, the Tax Commissioner is required to impose a penalty if the taxes are not timely made. Unlike other penalty statutes, however, the Commissioner has no discretion under R.C. 5715.39 regarding the remission of penalties; he is required to grant remission only if the express conditions of the statute are met. *Labuda v. Tracy* (Jun. 13, 1993), BTA No. 92-M-416, unreported. Even if a property owner's situation is sympathetic, the Commissioner is unable to remit the penalty if the failure does not fall within one of the narrowly defined fact patterns.

R.C. 323.13 provides that the failure to receive any tax bill does not, in and of itself, excuse a failure to timely pay the bill. Thus, under R.C. 5715.39(A) and (B), failure to receive a tax bill will result in remission only where the taxpayer proves the bill was not received due to the treasurer's error or negligence, or, if there has been no

negligence or error, where the taxpayer makes a good faith effort to acquire the bill within thirty days after the last day upon which payment could have been made. Here, no inquiry into the failure to obtain a bill was made until July 1998.

Ms. Frey contends that an error led to the improper mailing of the tax bill in question. She states in her application for remission that she was not alarmed when she failed to receive the bill because she had recently purchased the property. She believed that the bill would have been sent to the previous owner, since taxes were billed six months in arrears. It was only when she did not receive a tax bill in June that Ms. Frey inquired into the matter. She learned that the June bill had been sent to an entity known as “TransAmerica.” Upon review, the Treasurer discovered that TransAmerica had erroneously requested that Ms. Frey’s bill be sent to them. Penalties had been assessed on the June payment but were later remitted due to the circumstances. In reviewing Ms. Frey’s application for remission of the January payment, however, the Treasurer reported to the Commissioner that the tax bill had been sent to Ms. Frey at her home address.

While Ms. Frey suggests in her notice of appeal that the Treasurer is mistaken in concluding that the January bill was sent out correctly, we can find nothing in the record to support such a conclusion. See *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 21. (“The rule is generally accepted that, in the absence of evidence to the contrary, public officers \*\*\* are presumed to have properly performed their duties \*\*\*.”) Even if we were to find that TransAmerica’s erroneous request to receive the tax bills had been made prior to the mailing of the January bill, we would still be constrained to affirm

the Commissioner. In such circumstances, TransAmerica would have committed the error, not the County Treasurer, as is required by R.C. 5715.39(A).

Based upon the forgoing, we are unable to find that Ms. Frey has demonstrated to this Board that she has satisfied the prerequisites for remission under R.C. 5715.39 or that the Tax Commissioner's denial was otherwise erroneous. Therefore, it is the decision and order of the Board of Tax Appeals that the Commissioner's denial of the application for remission be, and the same hereby is, affirmed.