

OHIO BOARD OF TAX APPEALS

Nannie Montgomery,)	
)	
Appellant,)	CASE NO. 01-R-72
)	
vs.)	(PENALTY REMISSION)
)	
Thomas M. Zaino,)	
Tax Commissioner of Ohio,)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

For the Appellant	- Nannie Montgomery, <i>Pro Se</i> 3589 Ludgate Road Shaker Hts., OH 44120
For the Appellee	- Betty D. Montgomery, Esq. Attorney General of Ohio By: Barbara L. Barber, Esq. Assistant Attorney General 16th Floor - State Office Tower 30 East Broad Street Columbus, Ohio 43266-0410

ENTERED: May 11, 2001
Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This cause is before the Board of Tax Appeals upon a notice of appeal filed by Nannie Montgomery. Ms. Montgomery appeals a decision of the Tax Commissioner, in which the Commissioner denied the appellant's application for the remission of a real property tax penalty assessed for late payment of 1999 real property taxes. The property is identified in the books and records of the Cuyahoga County Auditor as parcel number 732-21-110.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner ("S.T."), and the record of the evidentiary hearing before this Board ("R."). At the hearing, Ms. Montgomery appeared on her own behalf, and the Tax Commissioner was represented by counsel.

The record reflects that Ms. Montgomery mailed her 1999 real property taxes by U.S. regular mail on January 31, 2000. (S.T. 8) These taxes, however, were due and owing on January 26, 2000. (S.T. 4, 6) Because these taxes were paid late, a penalty of \$89.44 was assessed. (S.T. 3)

Ms. Montgomery was under the impression that she had mailed, and thus paid, her real estate taxes on time. (Notice of Appeal; R. 26) After receiving a penalty for late payment, Ms. Montgomery examined the back of her cancelled check and noticed that it was deposited on February 8, 2000. (R. 8) She called the treasurer's office and was told that there was a delay in processing her check. (*Id.*) Ms. Montgomery believed that the date the check was processed was also the critical date for timely payment of her real estate taxes.

Therefore, believing that the county's delay in processing her payment resulted in the late payment penalty, Ms. Montgomery filed an Application For the Remission of Real Property Tax Penalties. This request was denied by the Cuyahoga County Treasurer on August 2, 2000, and was subsequently denied by the Tax Commissioner on December 14, 2000. It is from that denial that Ms. Montgomery now appeals.

At the outset, we note the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is, therefore, 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 v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. 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 Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

R.C. 323.13 requires that the county treasurer cause to be prepared and mailed or delivered to each person charged with taxes a tax bill for property subject to taxation. A penalty is charged by the county treasurer against taxes for late payment pursuant to R.C. 323.121. Unlike other penalty statutes, the Tax Commissioner has no discretion regarding the remission of these penalties. He may grant remission only if certain conditions expressed in the statute are met. Even if a property owner's situation is sympathetic, if it does not fall within a prescribed exception, the Commissioner is unable to remit the penalty. *Labuda v. Tracy* (June 13, 1993), B.T.A. No. 92-M-416, unreported.

Relief from late payment penalties is authorized only under the limited circumstances set forth in R.C. 5715.39. That statute provides as follows:

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

"(A) The taxpayer could not make 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 payment of the tax.

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

Furthermore, public officials are afforded a presumption that they acted in a legal and lawful manner.

“The rule is generally accepted that, in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner. All legal intendments are in favor the administrative action.’ * * *.”

Cedar Bay Constr., Inc. v. Fremont (1990), 50 Ohio St.3d 19, 21. (Citations omitted.) See, also, *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71, paragraph seven of the syllabus.

A review of the record shows that the appellant failed to establish any of the circumstances set forth in R.C. 5715.39. Ms. Montgomery was unable to demonstrate by competent and probative evidence that she complied with R.C. 5715.39(D) by mailing her payment in sufficient time for the envelope to be postmarked on or before the January 26, 2000, the last day for payment of real estate taxes. Further, Ms. Montgomery did not prove that the county’s negligence resulted in her untimely payment. The Board recognizes Ms. Montgomery’s unfortunate situation of having her taxes postmarked and received just days late. However, once the appellant failed to meet her burden of proof, the Board is obligated to follow the statutory mandate as prescribed by Ohio law.

Therefore, the Board finds that Nannie Montgomery has failed to establish any of the four statutory grounds justifying a remission of the penalty pursuant to R.C. 5715.39. Thus, upon consideration of the evidence in the existing record and the applicable law,

the Board must reject Ms. Montgomery's arguments and is obligated to conclude that she is not entitled to a remission of the penalty incurred.

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