

OHIO BOARD OF TAX APPEALS

Lisa A. Schalip, dba Back Roads Antiques & Emporium,)	
)	
Appellant,)	CASE NO. 01-B-1240
)	
vs.)	(PERSONAL PROPERTY TAX)
)	
Thomas M. Zaino, Tax Commissioner of Ohio,)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	Lisa A. Schalip, <i>pro se</i> C/O Back Roads Antiques & Emporium 3321 North Roads Street Columbus, Ohio 43202
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General Taxation Section State Office Tower, 16 th Floor 30 East Broad Street Columbus, OH 43215-3248

ENTERED: February 15, 2002

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

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by the above-named appellant from a final determination of the Tax Commissioner, in which the Commissioner denied appellant's petition for the abatement of penalties imposed for the untimely filing of her 2000 personal

property tax return. Our review of this matter is based upon the notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner, and the record of the evidentiary hearing. Appellant waived hearing, whereas the Commissioner was represented by counsel.

Every taxpayer owning taxable personal property must file an annual personal property tax return with the county auditor of each county in which the property is located. See R.C. 5711.02. Returns must be filed annually between the fifteenth day of February and the thirtieth day of April. R.C. 5711.04. An extension of up to forty-five days may be granted, if timely applied for. R.C. 5711.04.

In the event a taxpayer fails to timely file a return, R.C. 5711.27 imposes the following penalties:

"No taxpayer shall fail to make a return within the time limits prescribed by law, or as extended pursuant to section 5711.04 of the Revised Code, nor fail to list in a return or disclose on an accompanying balance sheet or other information filed with the return any item of taxable property which he is required by sections 5711.01 to 5711.36 of the Revised Code to list therein.

"If a taxpayer does so fail the following shall apply:

"(A) In a 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 fails 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 under division (A) of this section, a penalty of up to fifty per cent thereof; but if such taxpayer makes within sixty days after expiration of the time prescribed by such sections, a return or an amended or supplementary return * * * such penalty shall be five per cent of the assessment * * *.

"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."

Appellant's 2000 personal property tax return was due on or before the date of April 30, 2001. It is uncontroverted that the tax return, which was postmarked May 14, 2001, was mailed late. However, appellant, in her notice of appeal, explains, as follows:

"The late filing of my 2000 return (filed in 2001) was not a result of willful neglect. I erroneously mailed (sic) because my accountant indicated an incorrect due date. I did not intentionally file this return late."

Because R.C. 5711.27 provides that the Commissioner "*may*" remit all or part of the mandatory imposed penalties, the Commissioner's authority is discretionary. As a result, once the Commissioner determines there is an absence of reasonable cause to abate the penalties, we may not reverse his determination unless an abuse of discretion is specifically demonstrated. *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67. An abuse of discretion connotes more than an error of law or judgment; it implies that the decision was

unreasonable, arbitrary, or unconscionable. *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728. See, also, *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83. As a reviewing body, we may not substitute our judgment for that of the Commissioner; moreover, the burden is with the appellant to demonstrate the abuse. *State ex rel. Duncan, supra; Smith v. Ohio Dept. of Human Serv.* (1996), 115 Ohio App.3d 755. In other words, our review of appellant's request for abatement may not include a determination of whether appellant's failure to timely file was due to reasonable cause and not willful neglect, but must be limited to a determination as to whether the Tax Commissioner abused his discretion in denying appellant's petition. *Jennings & Churella, supra; Coleman Young Motors, Inc. v. Limbach* (1988), 51 Ohio App.3d 117.

In addition, we have consistently held that a taxpayer's reliance upon an accountant does not excuse the failure to file timely. For example, in *Transcon, Inc. v. Limbach* (Apr. 26, 1991), 89-F-697, unreported, we held:

"To assert that it was reasonable for appellant to assume that its long-time accountant would comply with statutory and professional requirements may resolve the matter between Transcon and its accountant, but that does not relieve Transcon of its statutory obligation under R.C. 5711.02 and 5711.04 to file annual personal property tax returns by April 30 accurately listing therein all taxable personal property required to be so listed.

"Reliance upon an accountant is not uncommon but that reliance cannot function to excuse a taxpayer from the consequences of his failure to comply with the

settled principle that tax returns have fixed filing dates and returns must be filed (and taxes paid) when due or serious problems will surely result. Failure to comply with a basic statutory obligation is not excused simply by the assignment or delegation of a portion of the responsibility therefor." *Id.* at 13.

Considering all of the foregoing, we find that, while it appears that appellant's late filing was not intentional, appellant's specifications of error do not allege an abuse of discretion on the part of the Commissioner nor is there evidence to that effect. Nothing before us leads us to conclude that the Commissioner's denial of the petition constituted an abuse of discretion. It is therefore the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and the same hereby is, affirmed.

