

OHIO BOARD OF TAX APPEALS

Gregory B. and Kathryn L. Tatnall,)	
)	
Appellants,)	CASE NOS. 01-T-1183
)	
vs.)	(PENALTY REMISSION)
)	
Thomas M. Zaino, Tax)	DECISION AND ORDER
Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellants -	Gregory B. Tatnall, <i>pro se</i> 8708 Lindbergh Blvd. Olmsted Falls, Ohio 44138
For the Appellee -	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General Taxation Section State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215-3248

ENTERED: February 15, 2002

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

This matter is before the Board of Tax Appeals pursuant to a notice of appeal filed by Gregory and Kathryn Tatnall. The Tatnalls appeal from the Tax Commissioner's denial of their application for the remission of real property tax penalties. The Board of Tax Appeals now considers this matter upon the notice of appeal and the statutory transcript certified to this Board by the Tax Commissioner. Both parties waived an opportunity to present additional evidence at a hearing before this Board.

According to the record, the real property tax for the period in question was due to be paid to the Cuyahoga County Treasurer on or before July 11, 2001. The treasurer, however, did not receive payment until August 24, 2001. Consistent with the applicable provisions of R.C. 323.121, the treasurer assessed a penalty of ten percent for the late payment of the tax. This penalty totals \$117.19.

In their notice of appeal, the Tatnalls state that they refinanced their mortgage in January 2001. While their old mortgage included an escrow account for the purpose of paying taxes and insurance on the subject property, the Tatnall's new mortgage did not have an escrow account. The Tatnalls represent that they made no change to the tax billing address, believing that "once an escrow account was closed the bills being paid from that account would come to" them. (Notice of Appeal at 1.)

In August 2001, the Tatnalls received notice of the cancellation of their homeowner's insurance policy, which had been previously paid out of the now-closed escrow account. This prompted the Tatnalls to inquire into the status of their real property tax, upon which inquiry they discovered that the payment deadline had already passed. Upon learning of the deficiency, the Tatnalls immediately paid the bill and filed their application for remission.

The Tatnalls suggest that the Commissioner should have granted their application for remission because the failure to timely pay occurred as a result of the mortgage company's failure to either make a change in the tax-billing address or advise the Tatnalls that it had received the bill after the escrow account had been closed. The Tatnalls further point out that they had made a good faith effort to pay

their tax bill within twenty-four hours of having discovered that the bill had not been paid.

We begin our review of this matter by noting that the findings of the Tax Commissioner are presumptively valid. A taxpayer that challenges a finding has the burden of rebutting this presumption and of establishing a right to the relief requested. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. When no competent and/or probative evidence is developed and properly presented to the Board which establishes that the Tax Commissioner's determination is "clearly unreasonable or unlawful," his determination is deemed to be correct. *Id.*

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 or manufactured home 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 sixty days preceding the last day for payment of the tax, if, in 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 United States postal service on or before the last day for payment of such tax. A private meter postmark on an envelope is not a valid postmark for purposes of establishing the date of payment of such tax.

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

The initial assessment of the penalty is prescribed by statute and is mandatory. *Plowden & Roberts v. Porterfield* (1970), 21 Ohio St.2d 276. Unlike other penalty statutes, 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* (June 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, while it is evident the Tatnalls took immediate action upon discovery of the deficiency, the inquiry into their failure to receive the bill occurred after the thirty-day period prescribed by R.C. 5715.39(B) had expired.

R.C. 323.13 further provides that a “change in the mailing address of any tax bill shall be made in writing to the county treasurer.” In *Tanyatanaboon v. Limbach* (Sep. 27, 1991), BTA No. 90-F-1461, unreported, we held that where real property tax bills have been formerly sent to a mortgage company, and the responsibility for paying the taxes shifts from the mortgage company to the property owner, it is the property owner’s duty to advise the county treasurer’s office of the change in mailing address. If the owner fails to notify the treasurer, any resulting delinquency in the payment of the taxes will not entitle the owner to a remission of penalties. See, also, *Core Investments v. Limbach* (Feb. 16, 1990), BTA No. 89-C-11, unreported (taxpayer is not entitled to remission when the property owner fails to supply the treasurer with the correct address). Cf. *Alter v. Tracy* (Jan. 19, 1996), BTA 95-H-285, 95-H-286, unreported (a request by a mortgage company to be removed as mortgagee does not constitute sufficient notice to the treasurer of a new address to which it can send the bill).

Situations such as this one, where taxpayers either rely upon their mortgage company to change the tax-billing address or are not informed by the mortgage company of their duty to file an address change with the county treasurer, are not uncommon. Nevertheless, it is the taxpayer, not the mortgage company, that has the

legal obligation to notify the county treasurer of any change in the billing address. As there is no evidence to show that the Tatnalls sent the requisite notice, we are constrained to conclude that the Tatnalls do not qualify for remission under the provisions of R.C. 5715.39.

The Tatnalls admit their mistaken understanding, that the termination of the escrow account would cause the bills to be redirected to them, brought about the late payment. They argue, however, that we should not discount their good faith effort to rectify the situation once the deficiency was discovered. While the circumstances in this instance may be unfortunate, the situation is not a matter that permits the exercise of discretion but one that requires both the Commissioner and this Board to grant remission only where the express provisions of R.C. 5715.39 have been met. *Labuda, supra*. As we stated in *Duffield v. Limbach* (May 12, 1989), BTA No. 88-D-150, unreported:

“What may be right and just, for the purpose of assessing a penalty or remitting a penalty properly and legally assessed, are matters for the General Assembly to consider, determine and establish. It has established the basis for assessing a late payment penalty under certain prescribed circumstances and also the authorized basis for the Tax Commissioner to remit such a penalty. Such provisions of law, neither the Tax Commissioner, nor this Board, is authorized to modify or ignore.” *Id.* at 4.

In closing, we also note that the penalty imposed upon the Tatnall’s tax bill should not be construed as a fine for an act of malfeasance or nonfeasance on the part of the Tatnalls. Instead, the penalty is “merely an indication that a governmental agency, which depends upon tax dollars for efficient management, failed to receive a

timely payment and a taxpayer, not as a matter of willful neglect, failed to make timely payment. Except for very limited situations, the General Assembly has placed the responsibility for prompt payment upon the taxpayer.” *Ledford v. Zaino* (Sept. 1, 2000), BTA No. 00-M-291, unreported.

Based upon the record before us, we are unable to find the Tatnalls have demonstrated to this Board that they have 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.

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