

OHIO BOARD OF TAX APPEALS

Sidney Diamond,)	
)	CASE NO. 01-V-1045
Appellant,)	
)	(PENALTY REMISSION)
vs.)	
)	DECISION AND ORDER
Thomas M. Zaino, Tax)	
Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant -	Sidney Diamond, <i>pro se</i> P.O. Box 994 Cincinnati, OH 45201
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, OH 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 Sidney Diamond. Mr. Diamond appeals from the Tax Commissioner's denial of an application for the remission of a real property tax penalty. The Board of Tax Appeals now considers this matter upon the notice of appeal, and the statutory transcript ("S.T.") certified to this Board by the Tax Commissioner. Both parties waived their opportunity to present evidence at hearing before this Board.

The application for penalty remission, ultimately denied by the Tax Commissioner, indicates that the real property taxes were due on June 20, 2001. Although not stated in the application, information in the statutory transcript indicates that the taxes were not paid until June 28, 2001. (S.T. p. 6) Outside the scope of the penalty remission before us today, the taxpayer also addresses in the application an issue of the property's underlying valuation because of a fire.¹ Consistent with the applicable provisions of R.C. 323.121, the treasurer assessed penalties totaling \$300.56 for the period in question.

Because Mr. Diamond did not appear for hearing, we are forced to rely solely on the documentary information submitted to determine the merits of this appeal. After reviewing the application for remission as well as the notice of appeal filed by Mr. Diamond, it appears that Mr. Diamond filed a complaint with the Hamilton County Board of Revision ("BOR") to reduce the auditor's value for the property due to fire damage incurred in the spring of 2001. During the pendency of the complaint before the BOR, it is evident that the then current taxes, based upon values that Mr. Diamond was complaining of, were still due on June 20, 2001. There is no evidence in the transcript that suggests Mr. Diamond exercised the opportunity to "tender pay" the taxes at an amount based on the value alleged in the matter pending before the BOR pursuant to R.C. 5715.19(H). Instead, it appears from the information

¹ Under the letterhead of a realtor's office, Karen Domine, who is not a party to this appeal, has submitted information on behalf of Mr. Diamond. Much of the information is related to an allegation of fire damage to the property and a corresponding complaint filed with the Hamilton County Board of Revision. The instant appeal only relates to the Tax Commissioner's determination not to remit the penalty assessed.

before us, that Mr. Diamond proceeded on the mistaken belief that the complaint filed with the BOR tolled or otherwise stayed his requirement to pay the property's current taxes.

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.

In his submission of materials, Ms. Domine argues that Mr. Diamond was “unable to get the new bill in a timely fashion our payment was one day late. (sic)” (Notice of Appeal, enclosed letter dated October 17, 2001) 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, the evidence indicates that the tax bill was mailed to P.O. Box 994, Cincinnati, Ohio 45201, the address of record with the treasurer since November of 2000. (S.T., p. 6)

There is no evidence to show that Mr. Diamond did not receive the tax bill through negligence or error of the auditor or treasurer. Further, the evidence indicates that Mr. Diamond admittedly paid the taxes late, given what appears to be a mistaken belief that the complaint filed with the BOR would somehow eliminate or delay the necessity to pay the current tax bill in a timely fashion. Therefore, we are constrained to conclude that Mr. Diamond does not qualify for remission under the provisions of R.C. 5715.39.

The present situation is not a matter of interpretation 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.

Based upon the record before us, we are unable to find that Mr. Diamond has demonstrated to this Board that he 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 applications for remission be, and the same hereby is, affirmed.

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