

OHIO BOARD OF TAX APPEALS

CFH Limited,)	
)	CASE NO. 01-V-1135
Appellant,)	
)	(PENALTY REMISSION)
vs.)	
)	DECISION AND ORDER
Thomas M. Zaino, Tax)	
Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant - Bradford Gaylord
CFH, Limited
30 South Franklin Street
Chagrin Falls, OH 44022

For the Appellee - Betty D. Montgomery
Attorney General of Ohio
By: Janice C. Katz
Assistant Attorney General
Taxation Section
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30 East Broad Street
Columbus, OH 43215-3248

ENTERED: February 15, 2002

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

This matter is before us upon a notice of appeal filed pursuant to the provisions of R.C. 5717.02. CFH Limited (hereinafter CFH) appeals a final determination of the Tax Commissioner denying its application for the remission of real property tax penalties. The matter is submitted for our determination based upon the notice of appeal, the statutory transcript (ST.) and the record (R.) of the Board's evidentiary hearing conducted on January 11, 2002.

CFH filed an application for the remission of real property tax penalties that

were assessed in the amount of \$164.42 for the late payment of the first installment of real property taxes on parcel 931-14-003 due on January 23, 2001; \$244.30 for the late payment of the first installment of real property taxes on parcel 932-03-011 due on January 23, 2001; and \$232.59 for the late payment of the first installment of real property taxes on parcel 932-17-005 due on January 23, 2001. CFH paid the first half tax bill on March 26, 2001, roughly 62 days after the due date. The Cuyahoga County Treasurer recommended that the penalty for late payment of the taxes be remitted. (ST. 5, 7, 9).

The Tax Commissioner denied the application for remission. (ST. 2). The final determination of the Tax Commissioner provides in pertinent part:

"The reason for the remission requests is that the applicant mailed the payments in a timely manner, on January 15, 2001. On March 12, 2001, the payment was returned to the applicant, due to lack of postage. Applicants note their long history of prompt payment.

"The county treasurer recommends that the request for remission be granted, because the taxpayer has demonstrated to the satisfaction of the county treasurer that timely payment was mailed.

"Penalties and interest on the late payment of taxes may be remitted only for the reasons found in Ohio Revised Code section 5715.39. That section states in pertinent part:

"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 a 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 General Assembly has intentionally limited the Tax Commissioner's authority to remit real property late-payment penalties to the four specific circumstances described in R.C. 5715.39 (A)-(D). Except in the limited circumstances set forth by law, the Tax Commissioner has no authority to grant remission, even if the late payment was due to a reasonable cause and not to willful neglect.

“In *United Way v. Kinney* (January 29, 1980), B.T.A. No. 79-C-347, the Board of Tax Appeals construed the timely payment of tax requirement of R.C. 5715.39 to mean the following:

‘Timely payment of real property taxes can be made only in one of two fashions:

‘(A) by hand delivering such payment to the office of the property county treasurer on or before the due date of such payment;

or

(B) by sending such payment through the mail by placing it in a U.S. Post Office or U.S. mail box on or before the closing date for payment of the taxes with the correct amount of postage and in an envelope addressed to the proper county treasurer.’

“Although the applicant's initial mailing of the tax payment was prior to the tax due date, it did not possess the correct amount of postage. Consequently, this cannot be considered as timely

payment. As such, applicant does not meet the requirements for remission set forth in R.C. 5715.39(A) through (D).”

The only issue before the Board in the instant appeal is whether the Tax Commissioner properly denied CFH’s request for remission of the late penalty assessed.

Initially it must be noted that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon the Appellant to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138; *National Tube v. Glander* (1952), 157 Ohio St. 407. The Appellant is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213.

As set forth above, the General Assembly provides for relief from late payment penalties only under the specific limited circumstances of R.C. 5715.39. The county treasurer has no discretion in the imposition of the statutory penalties at issue. R.C. 323.121. The Tax Commissioner is given no discretion in the remission of penalties if the tax is not timely paid, unless the specific circumstances of R.C. 5715.39 are met.

The application indicates that the Appellant claims to have mailed the check¹ on or about January 15, 2001. (ST. 4, 6, 8; R. tape). The application further states that the

¹ CFH’s check covered the payment of taxes for all three parcels. (S.T. 10)

envelope that the check was mailed in was returned due to lack of postage, on March 12, 2001, 48 days after the due date for the tax payment. (S.T. 4, 6, 8; R. tape)

At the hearing before this Board, Sheilagh Roth, vice-president of CFH, described that since the envelope had no postage or a return address, the return of the envelope to CFH was delayed for over two months. (S.T. 16; R. tape) Ms. Roth cannot attest as to whether the envelope contained sufficient postage or not.² (R. tape) Regrettably, CFH was unable to present any evidence to establish that there was in fact sufficient postage on the envelope.

As set forth above, we cannot conclude from the facts and the record before us that CFH has demonstrated error in the Tax Commissioner's final determination. Upon review of the record before us in the instant case, the Board finds and determines that the Appellant has failed to establish error on the part of the Tax Commissioner.

As we observed 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."

The initial assessment of the penalty is prescribed by statute and is

² Ms. Roth suggests the possibility that the postage and return address were omitted from the envelope because of human error or may have otherwise fallen off. (R. tape)

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, as in this case, the Commissioner is unable to remit the penalty if the failure does not fall within one of the narrowly defined fact patterns.

Accordingly, the final determination of the Tax Commissioner as set forth in his journal entry must be, and the same hereby is, affirmed.

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