

OHIO BOARD OF TAX APPEALS

Aztek Consulting Corporation,)	
)	CASE NO. 2003-P-233
Appellant,)	
vs.)	(PERSONAL PROPERTY TAX
)	PENALTY ABATEMENT)
Thomas M. Zaino,)	
Tax Commissioner of Ohio,)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	No Appearance Aztek Consulting Corporation 20525 Center Ridge Road, Suite 301 Cleveland, Ohio 44116
Notice of Appeal Filed By	-	John D. Hill, Jr. Aztek Consulting Corporation 20525 Center Ridge Road, Suite 301 Cleveland, Ohio 44116
For the Tax Commissioner	-	Jim Petro Attorney General of Ohio Janyce C. Katz Assistant Attorney General State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215

Entered July 11, 2003

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

Aztek Consulting Corporation seeks review of a final determination of the Tax Commissioner dismissing its petition for abatement of personal property tax late filing penalties on the basis that Aztek failed to file its petition within the sixty-day time period provided in R.C. 5711.28. Upon careful review of the record before us, we find that Aztek has failed to satisfy its assigned evidentiary burden to establish error on the part of the Tax Commissioner. Accordingly, we affirm the Tax Commissioner's final determination.

Aztek is a closely held corporation engaged in the business of website design, custom software development, media presentation, marketing communication and identity creation. John D. Hill, Jr. and his son are its sole shareholders. The corporation has twelve employees. Aztek's personal property tax return for the January 1, 2001 through December 31, 2001 tax period was due on June 17, 2002. Mr. Hill testified that he caused the return to be deposited with the postal service by regular mail on June 17, 2002. A stamp on the tax return indicates that the auditor received it on June 18, 2002.¹ And the statutory transcript contains a sworn affidavit from the auditor's representative indicating that the penalty assessment was mailed to Aztek on June 19, 2002. But Aztek's petition for abatement was not received by the Department of Taxation until September 9, 2002 - - - a date more than sixty days after the auditor mailed the assessment.² Upon review, the Tax Commissioner dismissed the petition as having been untimely filed. Aztek now appeals that determination.

We now consider this matter upon the record before us consisting of the notice of appeal, the statutory transcript filed by the Tax Commissioner in accordance with the provisions of R.C. 5717.02, and the record from the merit hearing we conducted upon the matter. No briefs have been filed. We begin by observing that R.C. 5711.28 provides:

"Within sixty days *after the mailing* of the notice of a penalty assessment prescribed by this section, the taxpayer may file with the tax commissioner, in person or by

¹ St - 14.

² St - 4.

certified mail, a petition for abatement of such penalty assessment.” (Emphasis added.)

The Tax Commissioner has made a specific finding that Aztek’s petition for abatement was untimely filed. And the Supreme Court has held that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It thus becomes incumbent upon Aztek 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. Aztek 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.

But no evidence has been offered to controvert the Tax Commissioner’s finding. Indeed, the record confirms that the petition for abatement was filed after the sixty-day period referenced in R.C. 5711.28. Mr. Hill testified that Aztek did not receive the assessment notice. But the General Assembly has provided that the sixty-day period begins to run after the mailing of the assessment notice, not after receipt by the taxpayer. In *Leiphart Lincoln-Mercury, Inc. v. Bowers* (1958), 107 Ohio App. 259, the Lucas County Court of Appeals observed:

"The courts of Ohio have fully recognized as fundamental and elementary that a litigant has no inherent right of appeal or review, that there is no common law right of appeal, which right is purely statutory, and that to have

jurisdiction of an appeal provisions of law providing the method of appeal must be complied with.”

In *The American Restaurant and Lunch Company v. Glander* (1946),

147 Ohio St. 147, the Supreme Court further commented:

"These requirements are specific and in terms that are mandatory. The very statute which authorizes the appeal prescribes the conditions and procedure under and by which such appeal may be perfected. Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred. The party who seeks to exercise this right, must comply with whatever terms the statutes of the state impose upon him as conditions to its enjoyment."

The Supreme Court has applied these principles to petitions filed with the Tax Commissioner in the same manner as appeals filed with a court. In *Akron Standard Division of Eagle-Picher Industries, Inc. v. Lindley* (1984), 11 Ohio St.3d 10, 11, at footnote 2, the Supreme Court observed:

"It should be noted that we are not bound by *stare decisis* since *American Restaurant* specifically applies to 'appeals' only. However, finding no appreciable difference between appeals and reassessment petitions in this procedural context, we find the language of *American Restaurant* to be instructive."

Because the record before us establishes that Aztek's petition was filed after the sixty-day period set forth in R.C. 5711.28 had expired, we must conclude that Aztek has failed to satisfy its assigned evidentiary burden to demonstrate error on the part of the Tax Commissioner.

But even if Aztek's petition for abatement was timely filed, we still would be unable to grant the relief requested. R.C. 5711.27 provides:

“No taxpayer shall fail to *make a return* within the time prescribed by law * * *.”

We have previously held that the phrase “make a return” requires that the return be *delivered* to the auditor. Mere deposit in a postal receptacle is insufficient. The United States Supreme Court held many years ago in *United States v. Lombardo* (1916), 241 U.S. 73, 76, 36 S. Ct. 508, 509, 60 L.Ed. 897, 898:³

“The word ‘file’ is derived from the Latin word ‘filum,’ and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. ‘Shall file’ means to deliver to the office and not sent through the United States mails. *Gates v. State* 128 N.Y. Court of Appeals, 221. A paper is filed when it is delivered to the proper official and by him received and filed. *Bouvier Law Dictionary*; *White v. Stark*, 134 California, 178; *Westcott v. Eccles*, 3 Utah, 258; *In re Van Varcle*, 94 Fed. Rep. 352; *Mutual Life Ins. Co. v. Phiney*, 76 Fed. Rep. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act.”

While Ohio's personal property tax employs the phrase “make a return” rather than “file,” we held in *Nu-Chiropractic, Inc. v. Zaino* (June 1, 2001), BTA No. 2001-P-70, unreported, that we did not find a meaningful distinction as to the

³ *United States v. Lombardo*, supra, was cited with approval by the Supreme Court in *Fulton v. State ex rel. General Motors Corp.* (1936), 130 Ohio St. 494, 498 and more recently it was relied upon in *Elkem Metals Co. L.P. v. Washington Cty. Bd. of Revision* (1998), 81 Ohio St.3d 683.

requirement of delivery to the proper public official. Aztek's reference to the Internal Revenue Service's "mailbox filing" requirements is not persuasive, as there the mode of filing is specifically expressed within the applicable statute. Accordingly, even if Aztek's petition for reassessment were timely filed, we would still be required to find that Aztek failed to file its tax return on time. For it is undisputed that the auditor did not *receive* the return until June 18, 2002 - - - one day after the extended due date.⁴

Last, we address Aztek's assertion in its notice of appeal that the penalty "seems quite harsh for being only one day late." R.C. 5711.28 provides:

"If it appears that the failure of the taxpayer to timely return or list was due to reasonable cause and not willful neglect, the commissioner *may* abate in whole or in part the penalty assessment." (Emphasis added.)

"May" is a term that manifests the intention on the part of the General Assembly to vest discretion in the Tax Commissioner. It thus is the Tax Commissioner, not the Board of Tax Appeals, in whom the General Assembly has vested the power to abate penalties. The Supreme Court held in *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29, in quoting from *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483, 485:

"The remission of a penalty under this provision is discretionary with the Tax Commissioner and cannot be

⁴ St – 14.

reversed by the Board of Tax Appeals unless an abuse of discretion is demonstrated.”

The Supreme Court held in *Jennings and Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70, that we are limited to the question of whether the taxpayer has demonstrated that the Tax Commissioner abused his discretion:

“Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. [Citation omitted.] An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable.”

And in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, the Supreme Court observed:

“(A)n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an ‘abuse’ in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.”

The record before us fails to support a claim of abuse of discretion.

While we sympathize with Aztek’s circumstances, for each of the foregoing reasons the final determination of the Tax Commissioner must be, and the same hereby is, affirmed.