

## OHIO BOARD OF TAX APPEALS

Elco Corporation,	)	
	)	CASE NO. 2004-G-281
Appellant,	)	
	)	(PERSONAL PROPERTY TAX
vs.	)	PENALTY ABATEMENT)
	)	
William W. Wilkins,	)	DECISION AND ORDER
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

### APPEARANCES:

For the Appellant	-	Elco Corporation 1000 Belt Line Street Cleveland, Ohio 44109-2800
Appeal Filed By	-	Robert A. Lunoe Controller Elco Corporation 1000 Belt Line Street Cleveland, Ohio 44109-2800
For the Appellee	-	Jim Petro Attorney General of Ohio Richard C. Farrin Assistant Attorney General State Office Tower, 16 <sup>th</sup> Floor 30 East Broad Street Columbus, Ohio 43215

Entered October 1, 2004

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed on behalf of the above-named appellant. Appellant appeals a final determination of the Tax Commissioner, in which said official denied appellant's petition for abatement of a personal property tax late filing penalty assessment.

The final determination of the Tax Commissioner reads in part as

follows:

“This matter now comes on for final determination. It involves a Petition pursuant to Section 5711.28 of the Ohio Revised Code (R.C.) for abatement of a personal property tax late filing penalty assessment.

“R.C. 5711.27 provides that if the return is not filed within the dates required by R.C. 5711.04, there shall be assessed to the return a late filing penalty.

“In this instance, the return was due by the extended due date of June 16, 2003. The tax return was filed with the Ohio Department of Taxation on September 18, 2003. A penalty of 10% of the listed value was assessed and mailed to the taxpayer on October 3, 2003.

“R.C. 5711.28 provides that a taxpayer may file with the Tax Commissioner, in person or by certified mail, a Petition for Abatement of Penalty within sixty days of the mailing of the notice of the penalty assessment. The Petition shall have attached to it a copy of the notice of assessment and shall state the reason for the objection. The taxpayer filed a Petition for Abatement of Penalty via fax on December 30, 2003. The taxpayer stated he had just taken over the Controller job due to the unexpected passing of the last controller.

“In an effort to assist the taxpayer in perfecting this appeal, the Tax Commissioner phoned the taxpayer to ask if there was a valid reason why the Petition was filed after the sixty-day appeal period and to send documentation.<sup>1</sup>

“The taxpayer responded via fax and stated that he had just taken over the Controller job due to the unexpected passing of the last Controller and he faxed a copy of the death certificate of the last Controller. The Tax Commissioner

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<sup>1</sup> Despite the suggestion to the contrary, there exists no “good cause” exception which would permit a petition for abatement to be filed beyond the period prescribed by statute. The sixty-day period is mandatory and not subject to adjustment or extension. See, e.g., *Carter v. Zaino* (Jan. 18, 2002), BTA No. 2001-B-1087, unreported, at 2, fn. 1; *Kinstle v. Zaino* (Aug. 2, 2002), BTA No. 2001-N-716, unreported, at 4, fn. 1.

notes that the former Controller past (sic) away on August 16, 2002, ten months before the tax return was due.

“In this case, the Tax Commissioner finds that the taxpayer’s letter, which was considered upon receipt as a Petition for Abatement of Penalty, is deficient since it does not meet all the requirements of R.C. 5711.28 in that it was received by the Tax Commissioner eighty-eight (88) days after the assessment notice was mailed to the taxpayer. The Board of Tax Appeals, in its decision *Straffon Desktop Productions v. Roger W. Tracy*, decided April 23, 1993, says:

“‘The thirty-day (now sixty) requirement under R.C. 5711.28 is mandatory. Unless the assessed party complies fully with the requirements set forth in the statute, the Tax Commissioner has no jurisdiction or authority to address the merits of the case and must dismiss the cause on jurisdictional grounds.’

“In this case, the Tax Commissioner dismisses the Petition for Abatement of the Penalty since it was received more than sixty days after the mailing of the assessment notice.” S.T. at 2-3.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript certified to this board by the Tax Commissioner (“S.T.”). Both parties waived the hearing for this matter.

Appellant’s notice of appeal states that the petition for abatement of penalty was mailed to the county treasurer’s office 42 days after receiving the Preliminary Assessment Certificate of Valuation. Appellant claims that it was misdirected as to where to send the petition for the penalty abatement by the Cuyahoga County Treasurer’s Office in Cleveland. Upon learning that the petition was sent to the wrong office, the appellant immediately submitted the petition to the Tax Commissioner.

First, the board notes that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. In addition, the taxpayer has the affirmative duty to come forward and prove the Tax Commissioner's findings are unreasonable, unlawful, or erroneous. *Manfredi Motor Transit Co. v. Limbach* (Aug. 17, 1990), BTA No. 1987-F-279, unreported. When no competent and probative evidence is presented by the appellant to show that the commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Averill v. Limbach* (Aug. 23, 1991), BTA No. 1990-C-1647, unreported.

Every taxpayer owning taxable personal property must annually file a personal property tax return with the county auditor of each county where the property is located. R.C. 5711.02. R.C. 5711.04 sets forth the time for making such returns. In the event a return is not timely filed in accordance with R.C. 5711.04, R.C. 5711.27 sets forth the penalties to be assessed.

The preliminary assessment is dated October 3, 2003. S.T. at 21. Further, the statutory transcript evidences that appellant's petition for abatement was sent and received by the Tax Department, via fax, on December 30, 2003. S.T. at 4. Consequently, the appellant did not timely file the petition for abatement of penalties. Thus, the Tax Commissioner had no jurisdiction to consider the petition. While we are sympathetic to appellant's situation, the appellant failed to provide any evidence to show that the Tax Commissioner's determination was in error. Accordingly, it is the

decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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