

follow, we find the commissioner misapplied the law in denying appellant's application for tax amnesty and, therefore, remand this matter to the commissioner.

The commissioner's final determination, dated September 26, 2006, states as follows:

"This matter now comes on for final determination. It involves a petition for abatement of a personal property tax late filing penalty assessment pursuant to R.C. 5711.28.

"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 penalty of up to 50% of the assessed value.

"In this instance, the returns were due by April 30 of each year. All three tax returns at issue were assessed a penalty of 15% of the listed value. The 2004 return was assessed and mailed to the taxpayer on February 17, 2006; the 2003 and 2005 returns were assessed and mailed to the taxpayer on March 3, 2006.

"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 on March 27, 2006, the date received by the Tax Commissioner.

"In the petition the taxpayer stated that the company 'was unaware of any missing returns' until they received a delinquency letter dated December 14, 2005. The Tax Commissioner notes that the taxpayer's Ohio Tax Amnesty application, filed on February 16, 2006, was denied since the taxpayer was notified of delinquencies on December 14, 2005 and February 2, 2006.

"R.C. 5711.28 provides that penalties may be abated if the late filing was brought about by reasonable cause and in the absence of willful neglect. In this instance, the Tax

Commissioner finds the petitioner's request for a penalty abatement is not well taken in that the returns were filed after the due dates without reasonable cause; and that the request was made for multiple late filed years. Therefore, the assessments shall stand as made." Statutory transcript at 1.

This matter is now submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to the board by the Tax Commissioner, and the record of the evidentiary hearing ("H.R.") before this board, which includes an audio recording of the hearing and an exhibit. At the hearing, the parties were represented by counsel. Danielle Hays, the Treasurer of CCAE, appeared and testified while the commissioner presented no witnesses.

Hays presented the history leading up to the late filing of the corporation's personal property tax returns at issue. Hays explained that her father founded CCAE in 1978 and her husband has worked at CCAE since the 1980s. H.R. at 9:16-20. She testified that her father ran the business without tax delinquencies until he retired in 2000, when his partner Gerald Bailey became the company's new president and treasurer. H.R. at 9:44. Hays realized in the summer of 2005 that the company was experiencing financial problems. Specifically, Hays testified that Bailey was not paying vendors and not filing prepared tax returns or paying taxes. On October 1, 2005, Bailey agreed to resign and Hays became CCAE's treasurer and her husband became its president. H.R. at 9:16-20. To avoid bankruptcy and the potential loss of jobs for CCAE's 50 employees, Hays testified that she negotiated payment plans with vendors and creditors. Hays said since she became treasurer, she has been making separate monthly payments for CCAE's state of Ohio sales tax and personal

property tax liabilities. H.R. at 9:39-40. To make payments to all of CCAE's creditors and vendors, corporate assets were sold and Hays put some amounts on personal credit cards and has worked without compensation. H.R. at 9:27.

Hays testified that she was first alerted of the taxes at issue in this appeal when she read a December 14, 2005 letter from the commissioner informing the company that 2003 to 2005 personal property tax returns had not been filed.¹ S.T. at 98; H.R. at 9:21, 9:30. She said she immediately contacted CCAE's accountant and, on January 16 and February 14, 2006, filed tax returns that previously had been prepared but not filed by her predecessor Bailey. S.T. at 14, 83; H.R. at 9:30.

Between January 1 and February 15, 2006, the commissioner had in place a tax amnesty program to excuse penalties and half interest accrued on qualifying delinquent personal property taxes if the taxpayer filed required tax returns with the commissioner. Appellee's Exs. 1-2. On February 15, 2006, CCAE filed an amnesty application regarding its 2003 to 2005 personal property tax returns. S.T. at 42. A letter to CCAE dated February 23, 2006 from the Ohio Department of Taxation states, in relevant part:

“*** Your amnesty application has been reviewed and the status is as follows [for] tax period 2003, 2005 *** personal property tax 920: *** denied. Taxpayer was notified by the Personal Property Tax Division by telephone for the delinquent 2003 and 2005 tax returns on February 2, 2006. Additional notification of the delinquent 2004 920 return was mailed to taxpayer on December 14, 2005. ***” S.T. at 13.

¹ Hays testified that the letter CCAE received referenced tax years 2003 and 2004, but not 2005.

In a March 24, 2006 letter, Hays filed an objection to the denial with the commissioner and requested abatement of penalty. S.T. at 4-10. Hays included copies of the Ohio Department of Taxation's Preliminary Assessment Certificates of Valuation that had been sent to CCAE. S.T. at 6-8. The certificates state penalty amounts for each tax year and are dated March 3, 2006 for tax years 2003 and 2005 and February 17, 2006 for tax year 2004. Id. The bottom of each certificate states "THIS IS NOT A TAX BILL. The County Treasurer will bill you for the amount of taxes charged against you for the year indicated." Id.

We begin by observing that the Supreme Court of Ohio has determined 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 a taxpayer challenging a decision of the Tax Commissioner to rebut the presumption and establish a clear right to the relief requested. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St. 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *Natl. Tube v. Glander* (1952), 157 Ohio St. 407. The burden is on the taxpayer to present credible evidence to support its claim that an assessment is in error. *Kern*, supra; *May Co. v. Lindley* (1982), 1 Ohio St.3d 6; *Federated Dept. Stores v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is developed and presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp.*, supra.

CCAIE contends that the commissioner erred in denying the appellant's amnesty application. We agree. CCAIE filed its late personal property tax returns and amnesty application during the amnesty period after receiving notification that the returns had not been filed. The commissioner argues that CCAIE does not qualify for amnesty because the program excludes from "qualifying delinquent personal property taxes" "[t]axpayers who have been previously notified of a delinquency, been billed or assessed by the Department of Taxation or are currently under audit by the Department." Appellee's Exs.1-2.

Section 553.01(A)(3) of (2005) Am.Sub.H.B. No. 66, which amended R.C. 5739.01, effective June 30, 2005, and contained uncodified law, excludes certain taxes from the amnesty program as follows:

"Qualifying delinquent taxes" and "qualifying delinquent personal property taxes" do not include any tax for which a notice of assessment or audit has been issued, for which a bill has been issued, which relates to a tax period that ends after the effective date of this section, or for which an audit has been conducted or is currently being conducted."

Applying the above statute, we find the Ohio Department of Taxation's December 14, 2005 letter and February 2, 2006 phone call to CCAIE insufficient to remove these taxes from qualification in the amnesty program. *Id.*; S.T. at 1, 13, 98. The communications to CCAIE were notices of tax returns that were overdue; they were not assessments or bills. In fact, part of the December 14, 2005 letter from the Ohio Department of Taxation refers to an estimated assessment being issued in the future if the taxpayer does not comply with the notice to file the returns. Moreover, each of the preliminary assessment certificates sent to CCAIE after the returns were filed explicitly

states “THIS IS NOT A TAX BILL. The County Treasurer will bill you for the amount of taxes charged against you for the year indicated.” CCAE’s notice of appeal states it was not actually billed by the treasurer until May 2006. Based on a review of the record, we find no notice of assessment or audit had been issued, no bill had been issued relating to a tax period ending after June 30, 2005, and no audit had been conducted or was in progress. Consequently, we find the commissioner misapplied the law in denying appellant’s application for tax amnesty.

Section 553.01(C)(2) of the amnesty program enabling legislation, *supra*, states as follows, with emphasis added:

“During the program, if a person who owes qualifying delinquent personal property taxes files a return with the Tax Commissioner, in the form and manner prescribed by the Tax Commissioner, listing all taxable property that was required to be listed on the return required to be filed under section 5711.02 of the Revised Code, the Tax Commissioner shall issue a preliminary assessment certificate to the appropriate county auditor. Upon receiving a preliminary assessment certificate issued by the Tax Commissioner pursuant to this division, the county auditor shall compute the amount of qualifying delinquent personal property taxes owed by the person and shall add to that amount one-half of the interest prescribed under sections 5711.32 and 5719.041 of the Revised Code. The county treasurer shall collect the amount of tax and interest computed by the county auditor under this division by preparing and mailing a tax bill to the person as prescribed in section 5711.32 of the Revised Code. *If the person pays the full amount of tax and interest thereon on or before the date shown on the tax bill all applicable penalties and one-half of any interest that accrued on the qualifying delinquent personal property taxes shall be waived.*”

As noted, by the time CCAE received the treasurer’s tax bill, the Ohio Department of Taxation had already denied CCAE’s amnesty application. In construing the plain

language of the above statute, we further find that as a result of the erroneous amnesty denial, CCAE was never presented with the option to pay the required tax and interest in exchange for a waiver of penalty and interest, as provided by the program. Consequently, the board further finds the commissioner's determination premature as to the petition for abatement of personal property tax penalty assessment.

Upon consideration of the record and statutes, 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, reversed. Accordingly, we remand this cause to the Tax Commissioner and order him to grant CCAE's amnesty application, conditioned on the program's requirement of immediate payment in full of the delinquent personal property taxes and half of the interest.²

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² In calculating the amount due, the commissioner should first credit all CCAE payments to date for tax years 2003, 2004, and 2005 toward the tax and interest portion of the treasurer's May 2006 tax bill.