

OHIO BOARD OF TAX APPEALS

Dane Kennedy,)	CASE NO. 2008-N-194
)	
Appellant,)	(SALES TAX)
)	
vs.)	DECISION AND ORDER
)	
Richard A. Levin,)	
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	Dane Kennedy, pro se P.O. Box 981 Bucyrus, Ohio 44820
For the Appellee	-	Richard Cordray Attorney General of Ohio Damion M. Clifford Assistant Attorney General State Office Tower, 25 th Floor 30 East Broad Street Columbus, Ohio 43215
Notice of appeal filed by	-	Mizeck Miller & Company, Inc. Roger R. Miller, CPA, CVA 228 South Sandusky Avenue Bucyrus, Ohio 44820

Entered January 13, 2009

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

Dane Kennedy appeals from a final determination of the Tax Commissioner, in which the commissioner affirmed his finding that appellant is liable for unpaid penalties, additional charges, and pre-assessment interest totaling \$853.43. This assessment relates to the periods of July 1, 2005 to December 31, 2005.

Through the final determination, the commissioner denied appellant's request for remission of penalties, additional charges, and interest, which were assessed as a result of unpaid sales tax. Based on appellant's failure to file a return, the commissioner, pursuant to R.C. 5739.12(D), levied an additional charge of \$168.21, including a penalty of \$58.87. Statutory Transcript ("S.T.") at 1. A penalty of 35% of the sales tax owed was assessed as provided by R.C. 739.133(A)(1), resulting in a penalty due of \$588.74. *Id.* The commissioner also imposed pre-assessment interest of \$37.61 pursuant to R.C. 5739.133. *Id.*

A review of the record indicates that appellant's accountant, by letter dated June 19, 2006, responded to the commissioner's notice of assessment with regard to the sales tax owed by appellant for the periods in issue. S.T. at 21. In that letter, appellant's accountant stated that appellant's check had apparently been lost in the mail, and another check for the sales tax due was enclosed with said letter, in addition to another copy of the sales tax return. Appellant's accountant further requested that any fines or penalties be abated with regard to appellant's account.

On December 20, 2006, the commissioner issued a notice of corrected assessment. S.T. at 4. This notice corrected the commissioner's previous assessment dated June 8, 2006, and increased the balance due from \$789.74 to \$853.43. A petition for reassessment, dated January 3, 2007, was subsequently filed with the commissioner, disputing the corrected assessment amount of \$853.43. S.T. at 3. In his petition for reassessment, appellant waived hearing and elected to have the matter decided upon the information submitted. *Id.*

The commissioner's final determination denying appellant's request for remission of penalties, additional charges, and interest was issued January 14, 2008, and a notice of appeal was timely filed with this board on February 14, 2008. With regard to the return and payment being lost in the mail, appellant's notice of appeal states, in pertinent part:

"The taxpayer truly believes that his original sales tax return for the period 7/1/2005-12/31/2005 was lost in the mail. He was unaware that anything was wrong until he received an assessment in the mail ***."

This matter is submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript certified to this board by the commissioner. Both appellant and counsel for the commissioner waived their right to appear at a hearing before this board.

We begin by observing 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 commissioner's findings are incorrect, the Board of Tax Appeals must affirm the commissioner's findings. *Kern, supra*; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp., supra*. Mindful of such burden, the board proceeds with its determination.

In reviewing the record before us, we find no evidence that proves appellant's payment was lost in the mail. We note that appellant did not appear at the hearing scheduled in this matter, thereby missing the opportunity to further develop the factual record. Without further information, we are unable to conclude that appellant has satisfied his burden. We therefore find that appellant has failed to prove by competent and probative evidence that the final determination of the commissioner is in error.

The Tax Commissioner's authority to abate penalties assessed pursuant to R.C. 5739.13 is discretionary. The commissioner's exercise of discretionary powers must be sustained unless an abuse of that discretion is established. *Kern, supra*; *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70 ("R.C. 5739.13 mandates the imposition of a penalty in the event of an assessment. Remission of the penalty is discretionary. *** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. ***"). See, also, *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29, 31-32. Generally, the commissioner abuses his discretion when the record manifests that his decision is "unreasonable, arbitrary, or unconscionable." *Jennings, supra*.

Relative to what constitutes an abuse of discretion, we note the Supreme Court of Ohio's decision in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, in which the court, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, stated:

“[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 the defiance thereof, not the exercise of reason but rather of passion or bias. ***.”

Here, appellant presented no evidence to establish an abuse of discretion. The record indicates that the commissioner had the opportunity to examine the circumstances in this matter, and, upon review, elected to maintain the aforementioned penalties, additional charges, and interest. Based on the record before us, we do not find that the commissioner abused his discretion by acting in an unreasonable, arbitrary, or unconscionable manner in denying appellant's requests.

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

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