

Michael Dervos,)
)
 Appellant,) CASE NO. 96-R-1797
)
 vs.) (REMISSION)
)
 Roger W. Tracy,)
 Tax Commissioner of Ohio,) DECISION AND ORDER
)
 Appellee.)

APPEARANCES:

For the Appellant - Michael Dervos
58 Granby Place West
Westerville, Ohio 43081

For the Appellee - Betty D. Montgomery
Attorney General of Ohio
By: Phyllis J. Shambaugh
Assistant Attorney General
16th Floor - State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410

Entered: July 18, 1997

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

This cause is before the Board of Tax Appeals upon a notice of appeal filed by Michael Dervos. Mr. Dervos appeals a decision of the Tax Commissioner, in which the Commissioner denied Mr. Dervos' application for the remission of a real property tax penalty assessed for late payment.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner ("S.T."), and the record of the evidentiary hearing held before this Board ("R").

Mr. Dervos testified that he purchased a lake home in Perrysville, Richland County, Ohio. This second home was located on state property, in the Muskingum Watershed District. Mr. Dervos owned the building, and he leased the land from the state for eight hundred dollars a year.

When purchasing this property, Mr. Dervos testified that he was told that there would be no real estate taxes. (S.T. 6-7) However, Mr. Dervos was unable to identify the person who gave him that information. He paid cash for the lake home, so there was no escrow account established, which, Mr. Dervos inferred, would have required him to accrue property taxes in escrow on a monthly basis.

Seven years after he purchased the house in Richland County, Mr. Dervos was applying for a home equity loan and discovered that there was a lien on his property for back taxes. (S.T. 7) After investigating, Mr. Dervos learned that every year a tax bill had been mailed to his second residence in Perrysville, Ohio, but was returned, marked "no receptacle." The lake home had no mailbox, and Mr. Dervos did not receive mail there. (S.T. 8, 13-14)

According to Mr. Dervos' testimony, he was told by an employee of the Richland County Treasurer's office that the returned tax bill was simply placed in the file. Further, Mr. Dervos testified that the county employee stated that no attempt was made to locate him, and no attempt would have been made until the house was put up for auction. (S.T. 8) After ascertaining the

amount owed, Mr. Dervos paid the bill in full, including penalties and interest. (S.T. 9)

In June 1 996, Mr. Dervos filed an Application For the Remission of Real Property Tax Penalties. (S.T. 3) This request was denied by the Richland County Treasurer on June 28, 1996 and by the Tax Commissioner on December 5, 1996. (S.T. 3 and 4) It is from the December 5, 1996 denial that Mr. Dervos now appeals.

At the outset, we note the presumption that the findings of the Tax Commissioner are valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut that presumption and establish a right to the relief requested. Belgrade Gardens v. Kosydar (1974), 38 Ohio St. 2d 135; Midwest Transfer Co. v. Porterfield (1968), 13 Ohio St. 2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. Federated Dept. Stores, Inc. v. Lindley (1983), 5 Ohio St. 3d 213.

R.C. 323.13 requires that the county treasurer cause to be prepared and mailed or delivered to each person charged with taxes a tax bill for property subject to taxation. This section further provides that a change in mailing address of any tax bill should be made in writing to the county treasurer. Pursuant to R.C. 323.13, the failure to receive a tax bill does not normally in and of itself excuse a failure to timely pay the bill. Rathi v. Limbach (May 3, 1991), B.T.A. Case No. 89-F-1139, unreported.

A penalty is charged by the county treasurer against the taxes for late payment pursuant to R.C. 323.121. Unlike other penalty statutes, the Tax Commissioner has no discretion regarding the remission of the penalties. He may grant remission only if the express conditions of the statute are met. Labuda v. Tracy (June 13, 1993), B.T.A. Case No. 92-M-416, unreported.

Relief from late payment penalties is only authorized under certain limited circumstances, as set forth in R.C. 5715.39. That statute provides, in pertinent part, that:

"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 current 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 the death or serious injury of the taxpayer, or his confinement in a hospital within ten days preceding the last day for payment of the tax, if, in any case, the tax was subsequently paid within thirty 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 postal service on or before the last day for payment of such tax."

Mr. Dervos maintains that Richland County could have, and should have made an attempt in the past seven years to locate him to inform him of the delinquent tax. It is, therefore, Mr. Dervos' position that by failing to contact him, the Richland County Treasurer's office was negligent.

Although the Board is sympathetic to Mr. Dervos' circumstances, we are constrained to find that the Tax Commissioner's determination manifests a correct application of R.C. 5715.39.

Mr. Dervos does not contend, and there is no indication in the record, that R.C. 5715.39(B), (C), or (D) apply in this matter. Instead, Mr. Dervos relies on R.C. 5715.39(A), that the county made an error or operated negligently in the performance of its duties in this matter.

The record is clear that the county prepared and mailed the tax bill, as required by R.C. 323.13. The tax bill was mailed to the address of the property being taxed. If this was not the address Mr. Dervos wanted the bill to be sent, then he had the duty to notify the county in writing of the address change, which he did not do by his own admission.

Since Mr. Dervos has come forward with no evidence to prove that there was negligence on the part of the Treasurer, we are unable to determine that the Tax Commissioner erred in denying remission.

Therefore, the Board finds that Mr. Dervos has not established any of the four, statutory grounds justifying a remission of the penalty pursuant to R.C. 5715.39. Thus, upon consideration of the evidence and the applicable law, the Board is obligated to conclude that Mr. Dervos is not entitled to a remission of the penalty incurred.

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. ohiosearchkeybta