

OHIO BOARD OF TAX APPEALS

Euro Cleveland Corp. dba)
Phoenix Coffee House,)
) CASE NO. 98-B-212
 Appellant,)
) (PERSONAL PROPERTY TAX)
 vs.)
) DECISION AND ORDER
 Roger W. Tracy,)
Tax Commissioner of Ohio,)
)
 Appellee.)

APPEARANCES:

- For the Appellant - Euro Cleveland Corp. dba
Phoenix Coffee House
3750 Pearl Road
Cleveland, Ohio 44109

and

Krume Stojanovski
Krume & Associates
7100 Broadway Avenue
Suite 209
Cleveland, Ohio 44105

- For the Appellee - Betty D. Montgomery
Attorney General of Ohio
By: Richard Farrin
Assistant Attorney General
16th Floor – State Office Tower
30 E. Broad Street
Columbus, Ohio 43266-0410

Entered: March 18, 1999

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant. This appeal is taken from a final determination of the Tax Commissioner, wherein said official determined that he lacked jurisdiction to consider appellant's petition for abatement of penalty.

The Tax Commissioner's Final Determination reads, in pertinent part, as follows:

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

"Section 5711.27, Ohio Revised Code, provides that if a personal property tax return is not filed within the date required by O.R.C. 5711.04, there shall be assessed a penalty of one-half of the value exempted under O.R.C. 5709.01(C)(3) and an additional penalty of up to 50% of the remaining listed value. In this instance, the returns were required to be filed by April 30, 1996 and was filed with the Cuyahoga County Auditor after that date. A penalty of the forfeiture of one-half the allowable exempted value, and 10% of the remaining listed value was assessed October 21, 1996. The assessment certificate was mailed to the taxpayer October 21, 1996.

"O.R.C. Section 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 thirty 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 indicate that the taxpayer's only objection is to the assessed penalty and shall state the reason for the objection. The taxpayer's representative filed a petition for abatement of penalty dated August 1, 1997, postmarked August 1, 1997 and received by the Tax Commissioner August 6, 1997. The Petition was sent by ordinary U.S. mail.

"This petition was filed after the expiration of the thirty day period allowed for the filing of the petition. 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 O.R.C. 5711.28 in that it was received by the Tax Commissioner two hundred eighty nine (289) days after the assessment notice was mailed to the taxpayer. The Board of Tax Appeals, in its decision Straffon Desktop Production vs Roger W. Tracy, decided April 23, 1993, says:

“The thirty-day 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.’

“The taxpayer indicated no reason for the late filing of the petition for abatement, not responding to a request sent by certified mail August 21, 1997.

“In this case, the Tax Commissioner dismisses the petition for abatement of the penalty since it was received more than thirty days after the mailing of the assessment notice.”

The appellant’s notice of appeal, filed by appellant’s accountant, reads, in pertinent part, as follows:

“Dear Sir or Madam:

“Please keep this in mind as you read this letter—the only error made was not filing the PPT return by April 30, 1996, which would have shown ‘\$0.00’ amount due. It was filed in September of 1996.

“Please accept this letter as an official notice of appeal per ORC Section 5717.02, in response to your correspondence, a copy of which is attached, regarding the above captioned ‘delinquent’ property tax notice or preliminary assessment certificate of valuation. Please be advised that I am officially requesting an abatement of the penalty and 50 percent loss of exemption on this matter. My client, Phoenix Coffee House (PCH), has always entrusted tax professional to properly prepare all Corp. tax returns necessary for the business. Obviously, the tax professional at that time did not prepared the 1996 Property tax return by the due date of April 30, 1996

because a federal extension was taken and extra time needed to properly ascertain the business income of 1996, as well as balances in fixed asset accounts that are necessary for the correct preparation of a PPT return. If the tax professional had prepared the return by the due date, Phoenix Coffee House would not have owed any taxes due to the \$10,000 exemption. Euro-Cleveland Corp. dba Phoenix Coffee House did not intentionally or willfully not comply with requirements to file a property tax return by April 30th.

“Again, the only error made was not filing the PPT return by April 30, 1996.

“The federal, state, and local tax returns were finalized in September of 1996. At that time the 1996 PPT form was also prepared. On October 17, 1996 a ‘Delinquent PPT Statement’ was received by the client showing an amount due of \$377.34. Obviously, the client was upset. A PPT return that was filed 5 months later than the due date caused a \$377.34 penalty; is that what the law intended? Obviously, my client and I consider this penalty amount excessive. I have been in contact, via letters and phone conversations with PPT people in the Ohio Dept. of Taxation and the Cuyahoga County Tax Commissioner office about this matter (copies of these letters are attached as well).

“Again, the only error made was not filing the PPT return by April 30, 1996.

“Consider that an ‘estimated’ return could have been prepared with payment of the first 50 percent due by April 30th and the remainder in six months. Well, 50 percent of ‘0’ is still ‘0’.

“I believe that laws that are designed to financially penalize a person or business usually state that such penalties reflect actual loss of income or to reimburse for normal and customary expenses incurred as a result of the financial hardship that the lost income caused. In this case, \$377.34 does not represent a fair penalty amount in my mind of the financial hardship the State of Ohio or Cuyahoga County has received in this case.

“As a result, I am asking that this penalty be abated. Now I know from personal experience that such cases (late

filings as late as 4 years) have been abated in the past. Therefore, I would like to consider this matter closed.

“I have discussed this matter with Mr. James Rokakis, Treasurer, Cuyahoga County, in the past. Mr. Rokakis is sympathetic to the problem here. Mr. Rokakis was present at the Grand Opening of the Phoenix Coffee House, which was a new small business that opened in 1994 in his ward while Mr. Rokakis served as Councilman of the City of Cleveland. Mr. Rokakis was instrumental in obtaining a Microloan for the business and assisting with other business grants.

“Please be advised this is not an effort to get away from paying a obligation. Given the circumstances, I do not believe this to be a valid obligation.”

The matter was submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript furnished by the Tax Commissioner. An evidentiary hearing was scheduled by this Board for February 26, 1999. However, on February 26, 1999 appellant’s accountant filed written correspondence with the Board stating that there would be no appearance at said hearing and further detailed appellant’s position on the matter. Appellant’s accountant also requested a continuance, if the letter was “unacceptable”. Appellee thereupon waived an evidentiary hearing before this Board.

Said correspondence reads, in pertinent part, as follows:

“Please find enclosed a copy of a letter from J. A. Redd, Assignment Commissioner, regarding the above captioned hearing scheduled for tomorrow at 1:30 p.m. I regret that I am not able to attend as I had planned. In lieu of my appearance, I ask that you please accept this letter and the attached past supporting documents/letters regarding this matter and ask that they be placed as exhibits of evidence for our position during the hearing.

“The position that we have explained since 1997 (when we were first notified) is that due to problems with our accounting system in early 1996, the Phoenix Coffee House tax

returns could not be prepared until September of 1996. All appropriate requests for an extension were filed on time, except for the PPT tax return. Preparation of the PPT return indicated an amount due because of the late filing (no tax would have been due had it been filed on time). We have asked the Ohio Dept. of Taxation, Property Tax Division, to abate the amount due. They have not agreed to abate any of the amount due.

“While I realize that in fact the Ohio Dept. of Taxation is correct, I am once again asking that this amount due be abated or reduced. The main problem here is that \$377.34 is an awful high penalty for the simple fact that a return was filed late. For most small business (which provide most of the employment in this country, and pay most of the taxes), this return is rather informational, as the \$10,000 exemption provides that no tax is due. So I ask how could you ask for \$377.34? Why not make it a \$50 penalty or something reasonable? This tax is not reasonable, especially if you are a struggling business and this is an excusable incident.

“In addition, the State then requires an appeals process that causes needless professional fees to the Phoenix Coffee House in order to settle a \$377.34 dispute. The professional fees to date would have been more than the amount due, except that I have not charged for any of my time related to this dispute. And of course, this hasn't been worth anyone's time at the State either.

“I apologize for the inconvenience this matter may have caused you and others in the employment of the State. This matter should have been resolved long ago.

“If this is not acceptable, I ask for a continuance. Please feel free to contact me tomorrow should you any questions. My cellular phone number is 216/396-1291. I can be available for a conference call if you would like, in lieu of my appearance.”

Ohio Adm. Code 5717-1-02, regarding the rules of practice and procedure before this Board reads as follows:

“(A) The board’s secretary or the designated assignment commissioner may schedule each appeal for hearing and written

notice thereof shall be given to the parties or their counsel of record by ordinary mail. For good cause shown, hearings may be continued by the attorney examiner to whom the appeal has been assigned, by a board member or the board's secretary. Requests for continuances should be directed to the attorney examiner assigned the case and filed, in writing, at least fourteen days prior to the scheduled hearing date.” (Emphasis added.)

In the matter at hand, the request for a continuance was not requested until the day of the scheduled Board evidentiary hearing. Further, nothing is cited in this request which would qualify as good cause for continuing this hearing to a later date. Therefore, the request for a continuance is denied.

The issue before the Board is whether the Tax Commissioner properly refused to consider appellant's petition for abatement.

Initially, we note that the findings of the Tax Commissioner are presumptively valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St.3d 221. Thus, our mandate is to determine whether the Tax Commissioner's actions were performed in good faith and in the exercise of sound judgment. The Board also notes that it is the taxpayer who has the affirmative duty to come forward and prove the Tax Commissioner's action and findings are unreasonable or unlawful. Id.

R.C. 5711.28 states, in pertinent part, as follows:

“Within thirty 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 certified mail, a petition for abatement of such penalty assessment. * * *.

“* * * 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. * * *”

The thirty-day requirement under R.C. 5711.28 is mandatory. Unless the assessed party strictly follows and fully complies with the procedural requirements set forth in R.C. 5711.28, the Tax Commissioner has no jurisdiction or authority to address the merits of the case and must dismiss the cause on jurisdictional grounds. See C & C Industrial Service, Inc. v. Limbach (June 12, 1992), B.T.A. Case No. 90-J-1610, unreported; American Restaurant & Lunch Co. v. Glander (1946), 147 Ohio St. 147.

In the matter before us, it is uncontroverted that appellant's Petition for Abatement of Penalty was received by the Tax Commissioner two hundred and eighty-nine (289) days after the assessment notice was mailed to the taxpayer and therefore was filed after the expiration of the thirty (30) day period pursuant to R.C. 5711.28.

For the reasons stated above, we find the Tax Commissioner's determination that he lacked jurisdiction to consider the petition was correct.

Giving consideration to the entire record in this matter, 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.