

OHIO BOARD OF TAX APPEALS

Kenneth Bonnema,) CASE NOS. 98-M-1305¹
) 98-M-1335
Appellant,)
) (PERSONAL PROPERTY TAX)
vs.)
) DECISION AND ORDER
Roger W. Tracy,)
Tax Commissioner of Ohio,)
)
Appellee.)

APPEARANCES:

Appeal Filed By - Melinda M. Mahoney
Patrick Kirk and Company
3601 Green Road
The Fairways – Suite 302
Cleveland, Ohio 44122

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: February 11, 2000

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed on behalf of Kenneth Troy Bonnema (“Bonnema”). Bonnema appeals a final determination of the Tax Commissioner, appellee herein, wherein the

¹ Mr. Bonnema’s appeal was docketed twice with this Board. Therefore, the matters have been consolidated for disposition purposes.

Commissioner denied Bonnema's petition for abatement of a late filing penalty concerning his 1998 personal property tax.

The Tax Commissioner's Final Determination states 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 date required by R.C. 5711.04, there shall be assessed to the return a penalty of up to 50% and a penalty of one-half of the \$10,000 list value otherwise exempt under R.C. 5709.01(C)(3).

"In this instance, the return was due by the extended due date of June 1, 1998. The tax return was filed with the Lake County Auditor's office on June 5, 1998. a penalty of a forfeiture of one-half of the exempt value and 5% of the remaining listed value was assessed on June 17, 1998.

"The taxpayer filed a requesting abatement of the above penalties. In his Petition, the taxpayer stated that the tax return was filed late because of confusion caused by moving between residences.

"R.C. 5711.28 provides that penalties can 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 is not well taken in that the return was filed after the due date without reasonable cause; and the records disclose that the taxpayer filed the 1994 and 1995 tax returns late, the penalties on which the Tax Commissioner abated for the 1994 return. Therefore, the subject assessment shall stand as made."

Bonnema's accountant, in the notice of appeal, objects to the decision of the Tax Commissioner and explains the reason for the late filing, stating that:

"We prepared the 1998 return on a timely basis and sent it to Mr. Bonnema for his signature and filing. He was going through a separation from his wife and was in transit between various residences. The return was misplaced in the confusion of moving. He mailed the return immediately after finding it, along with the tax due in the amount of \$292.20. Shortly thereafter, my client received the assessment. Mr. Bonnema appealed the preliminary assessment within the time allowed by law.

"My client then received a final determination from the Lake County Tax Commissioner (sic) dated November 6, 1998 indicating that the assessment shall stand as made. I respectfully request that you take this matter into consideration and cancel the assessment and abate the penalty. The transition of residence, along with the mental toll of the divorce proceedings, is reasonable cause of filing the return a few days late. My client had every intention of complying with the filing regulations."

This matter is now submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner, and the record of the evidentiary hearing before this Board.²

The facts appear as stated by Bonnema's accountant. While Bonnema's personal property tax return was due June 1, 1998, the return was actually filed June 5, 1998. (S.T. p. 6)

On June 6, 1998, a Preliminary Assessment Certificate was issued by the Lake County Auditor, including late filing penalties. (S.T. 12) On July 7,

²At the evidentiary hearing before the Board of Tax Appeals, Bonnema did not appear despite due notice of the hearing from this Board. The Tax Commissioner was represented by counsel.

1998, the Tax Commissioner received a letter from Bonnema, dated June 30, 1998, seeking abatement of the penalties imposed. (S.T. 11) After due consideration, The Tax Commissioner issued his Final Determination, finding that Bonnema's personal property tax return was filed after the due date for filing the return without good cause. (S.T. 1). It is from this determination that Bonnema now appeals.

The issue before the Board, then, is whether the Tax Commissioner properly denied Bonnema's request for abatement of the penalties imposed for late filing.

The findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. In addition, it is the taxpayer who 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), B.T.A. No. 87-F-279, unreported. When no competent and probative evidence is presented by the appellant to show that the Tax 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), B.T.A. No. 90-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. The returns must be filed annually between February 15 and April 30, although R.C. 5711.04 makes provision for an extension. In the event a return is not timely filed in accordance with R.C. 5711.04, R.C. 5711.27 requires that the following penalties be assessed:

“(A) In the case of a taxpayer who fails to make a timely return, the assessor shall add to the taxpayer's assessment

as a penalty, one-half of the taxpayer's taxable value that is exempt from taxation under division (C)(3) of section 5709.01 of the Revised Code. ***

“(B) In the case of a taxpayer who fails to make a timely return, ***, the assessor shall add to the assessment of each class or item of taxable property which the taxpayer failed to return, list or disclose and to any amount added under division (A) of this section, a penalty of up to fifty per cent thereof; but if such taxpayer makes, within sixty days after the expiration of the time prescribed by such sections, a return or an amended or supplementary return and lists therein or discloses on an accompanying balance sheet or in other information filed with the return all items of taxable property which is required by such sections to list, and in all cases in which the taxpayer's only default is his failure to pay the amounts specified in section 5719.02 of the Revised Code within the time therein specified, such penalty shall be five per cent of the assessment, ***.

“***

“Either or both of the penalties provided in this section may be abated in whole or in part by the assessor when it is shown that such failure is due to reasonable cause. ***.”

The Tax Commissioner's authority to abate penalties assessed pursuant to R.C. 5711.27 is discretionary. *Coleman Young Motors, Inc. v. Limbach* (1988), 51 Ohio App.3d 117. Therefore, the Tax Commissioner's decision should not be reversed by this Board unless his actions constitute an abuse of discretion. *Id.*; *Moon v. Tracy* (Nov. 24, 1993), B.T.A. No. 93-B-157, unreported. Generally, the Tax Commissioner abuses his discretion when the record manifests that his decision is unreasonable, arbitrary or unconscionable. *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67.

In the present case, the record supports the Tax Commissioner's determination that Bonnema's 1998 personal property tax return was not timely filed. Furthermore, Bonnema has not come forward with any evidence to show that the Tax Commissioner acted unreasonably, arbitrarily or unconscionably in making the penalty assessment in this case. Although the Board is sympathetic to Bonnema's circumstances, he has not presented sufficient evidence to show that the Tax Commissioner acted unreasonably, arbitrarily or unconscionably in failing to abate the penalties assessed. This is particularly true since this was not the first time Bonnema filed his personal property tax late.

Therefore, based upon the existing record and applicable law, the Board of Tax Appeals finds that Bonnema filed his 1998 County Return of Taxable Business Property late; thus, the Tax Commissioner properly assessed penalties. Further, we must find that Bonnema has failed to demonstrate that the Commissioner abused his discretion in failing to abate these penalties.

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