

OHIO BOARD OF TAX APPEALS

Ameriplas Machinery Corp.,)	
)	
Appellant,)	CASE NO. 99-A-428
)	
vs.)	(PERSONAL PROPERTY TAX)
)	
Roger W. Tracy, Tax Commissioner)	DECISION AND ORDER
Of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant - Donna M. Rose, Secretary/Treasurer
P.O. Box 441
Chesterland, Ohio 44026

For the Appellee - Betty D. Montgomery
Attorney General of Ohio
By: Janyce C. Katz
Assistant Attorney General
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Columbus, Ohio 43215

Entered June 25, 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 from a final determination of the Tax Commissioner. Therein, the Tax Commissioner

affirmed the late filing penalty assessed against appellant because the personal property tax return under consideration was filed late, without good cause, and the taxpayer had also been late in filing a personal property tax return in the past for which the penalties assessed thereon were abated.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner, and the record of the hearing before this Board. Although duly notified by letter of the hearing scheduled in this matter, no one appeared on behalf of the appellant, which submitted information, in writing, in support of its position and in lieu of appearing here.¹

In reviewing appellant's appeal, we recognize 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 the 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.

Initially, we note appellant's contentions, as set forth in the notice of appeal, wherein it indicates, in pertinent part, that:

“Though the Petitioner can understand that the State of Ohio believes that the Petitioner did not have reasonable cause to file late, the Petitioner wants to assure the State of Ohio that the Petitioner did have reasonable cause to file late. Also, the Petitioner wishes to prove that the

¹ The information appellant submitted reiterated its position that had already been set forth in the notice of appeal. We note that these documents are not considered part of the evidentiary record in this case, as, generally, documents presented to the Board that are not made part of the evidentiary record are not considered as evidence because it is inherently difficult to determine the credibility and reliability of such documents. See *Cunagin v. Tracy* (Mar. 31, 1995), B.T.A. Case No. 94-P-1083, unreported.

Petitioner did not willfully neglect to file Form 920 in a timely manner.

“A. There was reasonable cause for a late filing.

“1. The Rose family experienced many crises [sic] in the last 10 years; specifically in 1998 when tax filings were due. (Exhibit A-Letter to Ohio Department of Taxation 11/06/98)

“2. The accountants failed to request additional extensions to file Form 920 (after the Petitioner informed them that they would have to file extensions for the Corporation Income Tax Returns) because the Petitioner did not have the time to gather all the necessary information due to family crisis.

“Both of my accountants apparently did not realize that they needed to file an additional extension of time after they filed an extension of time to file the Corporation Income Tax Return. **Forms 920 have been filed late because the Petitioner’s accountants have failed to request additional extensions after the Petitioner informed them that they will have to file an automatic extension of time to file the Corporation Income Tax Returns.**

“The Petitioner has had two accountants, Joseph Kosar (1989-1996) and Gwendolyn Carlson (1997-1999), who have been handling business affairs for AmeriPlas Machinery Corp and Injection Precision Controls Corp. Both accountants filed for a 45 day extension to file Form 920. Then they filed for an Automatic Extension of Time to File the Corporation Income Tax Return. Since they use the information on the Corporate Income Tax Return to fill out Form 920, both accountants filed Form 920 when they file the Corporate Income Tax Return. If the Petitioner wants to start blaming accountants, the

Petitioner could state that her accountants should have known that they needed to file additional extensions of time when they became aware that they would not be filing Corporate Income Tax Returns until after the initial 45 day extension past [sic] April 30. The Petitioner relied on her accountants to file the appropriate extensions.

“B. The Petitioner did not willfully neglect to file on time. This is proven by all correspondence to accountant. (Exhibits B-7 Pages)

“C. The Petitioner has taken it upon herself to correct the problem for 1999. Therefore, the Petitioner has instructed her accountant to prepare Form 920 with the information she can provide the accountant to date, and then file an amended report, if necessary. The Petitioner mailed Form 920 on March 25, 1999 to Frank Russo, County Auditor, Cuyahoga County. (Exhibit C- 2 Pages)

“D. In addition to the above problems, Form 920, since 1994, has probably been filed in the wrong county. After much discussion, the accountant and the Petitioner concluded that as of 1994 (when AmeriPlas and Injection Precision Controls rented offices and assembly space at 1100 East 152nd Street, and later at 13415 Union Avenue), both companies should have filed Tax Form 920 in Cuyahoga County.

“Why did this confusion exist? – AmeriPlas Machinery Corp and Injection Precision Controls Corp maintain their corporate offices at 13331 Caves Road, Chesterland, Ohio 44026 and is on record with a mailing and billing address of P.O. Box 441, Chesterland OH 44026. The companies rented sales offices and assembly areas at 1100 East 152nd Street in Cleveland, Ohio, from March of 1994 through December of 1997, and beginning January 1, 1998 rented sales offices and assembly areas at 13415 Union Avenue in Cleveland, Ohio.

“The business is rather unique. The company designs and assembles injection molding machines

per a customer's specifications. The company also sells its 'intellectual knowledge.' For example, Ford Electronics will call and state that they are having a problem with one of their injection molding machines. This will generate a service order.

"SUMMARY OF APPEAL

"A. There was reasonable cause for late filing.

"B. The Petitioner did not willfully neglect to file on time.

"C. Upon further evaluation and understanding of the business, the accountant and the Petitioner have concluded that since 1994, Form 920 should have been filed in Cuyahoga County." (emphasis in original)

Appellant filed its petitions for abatement of personal property tax penalties pursuant to R.C. 5711.28, which provides in pertinent part that:

"Within thirty days after the mailing of the notice of a penalty assessment * * * , the taxpayer may file with the tax commissioner, in person or by certified mail, a petition for abatement of such penalty assessment. * * *

" * * * The commissioner shall review the petition without the need for hearing. 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. * * * "

According to the information contained in the statutory transcript, the subject personal property tax return was due on or before April 30, 1998, but was not filed until September 16, 1998. Based upon this late filing, an assessment, including late filing penalties of forfeiture of one-half of the exempt value and 5%

of the remaining listed value of the personal property in question, was issued to the taxpayer. Thereafter, appellant filed a petition for abatement of the late filing penalties. Regarding said petition, the Commissioner indicated in his final determination that:

“(t)he 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 1997 return late, the penalties on which the Tax Commissioner did abate. Therefore, the subject assessment shall stand as made.”

In the aforementioned statute (R.C. 5711.28), the General Assembly delegated the task of reviewing petitions for abatement to the tax commissioner. “The remission of a penalty under this provision is discretionary with the Tax Commissioner and cannot be reversed by the Board of Tax Appeals unless an abuse of discretion is demonstrated.” *Frankelite Co. v. Lindley* (1986), 28 Ohio St. 3d 29; quoting from *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483, 485 [11 O.O. 2d 240]. Thus, this Board’s duty in the instant matter is limited to a determination of whether the Tax Commissioner abused his discretion in denying abatement of the subject penalty, i.e., a determination of whether the Commissioner’s decision was “unreasonable, arbitrary or unconscionable.” *Jennings and Churella Construction Co. v. Lindley* (1984), 10 Ohio St. 3d 67, 70. See also *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83.

In the instant matter, we find that the record before us contains insufficient evidence to support a claim of abuse of discretion on the part of the Commissioner in denying abatement of the penalty in question, especially in light of the filing history of the appellant taxpayer. Accordingly, this Board finds that the Tax Commissioner’s findings were reasonable and lawful. 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.