

OHIO BOARD OF TAX APPEALS

Roger and Carol D. Middaugh,)	
)	
Appellants,)	CASE NO. 99-L-1439
)	
vs.)	(PENALTY REMISSION)
)	
Roger W. Tracy,)	DECISION AND ORDER
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	- Carol D. Middaugh, <i>pro se</i> 5590 Worcester Drive Columbus, Ohio 43232
For the Appellee	- Betty D. Montgomery Attorney General of Ohio By: Phyllis J. Shambaugh, Esq. Assistant Attorney General State Office Tower, 16 th Flr. 30 East Broad Street Columbus, Ohio 43215

ENTERED: February 11, 2000

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

This matter is before us upon a notice of appeal filed pursuant to the provisions of R.C. 5717.02. Roger and Carol D. Middaugh (hereinafter Appellants) appeal the imposition of a 10% late payment penalty by the Franklin County Treasurer. The Tax Commissioner denied the Appellant’s application for the remission of real property tax penalties on August 17, 1999. The matter is submitted for our determination based upon the notice of appeal, the statutory transcript (ST) and the record (R) of the Board’s evidentiary hearing conducted on December 15, 1999. Post hearing briefs were waived in this matter.

The Appellants filed an application for the remission of real property tax penalties that were assessed in the amount of \$109.58 plus interest for a total of \$154.78 for the late payment of the second installment of their 1997 real property tax bill. The application indicates that the property owners did not receive a tax bill and attempted to obtain one on December 30, 1998. The application further states that they had paid off their mortgage on the subject property in July, 1997, and that National City Mortgage Co. subsequently received the tax bill in December, 1997 for the first half taxes due in January, 1998. (ST 3). National City Mortgage Co. forwarded this tax bill to the Appellants by way of letter dated December 23, 1997. (ST 5). The first half tax bill was timely paid by the Appellants under cover letter dated January 2, 1998. (ST 4). In the cover letter the Appellants advised the Franklin County Treasurer that the mortgage had been paid in full and that all future bills were to be sent directly to the Appellants. The letter provided the Treasurer the correct mailing address and asked that the Treasurer's records be changed. (ST 4).

On the application for penalty remission in the instant case, the Franklin County Treasurer recommended that the remission of the penalty for late payment of the taxes be denied. (ST 2). The Treasurer states that there was no negligence by a county official and maintains that the taxpayer failed to make a good faith effort to obtain a tax bill or correct bill within thirty days after the due date. (ST 2). The Treasurer's office further claims that they had no record of receiving the taxpayer's request to change the address for the property tax bill in January of 1998 as claimed by the Appellants. (ST 2).

The Appellants appeared before the Board at the scheduled hearing and Carol D. Middaugh testified under oath regarding the facts that led to the imposition of the late payment penalty. Mrs. Middaugh testified that the Appellants had paid off the mortgage in July of 1997. (R 6). In December of 1997, the Treasurer's office sent the tax bill to National City Mortgage Co. (R 6). Mrs. Middaugh acknowledged

that the Treasurer would not have known the mortgage was paid off at that time. (R 6). Mrs. Middaugh testified that the mortgage company forwarded the tax bill to the Middaughs. (ST 5, R 6). Mrs. Middaugh further testified that on January 2, 1998 she sent the bill with payment of the first half taxes to the Treasurer. (R 6). She included a letter asking that the future tax bills be sent to their home and that they be sent an application for automatic deduction from their checking account. (ST 4, R 6).

The Treasurer has claimed that they have no record of receiving the request for change in the Appellant's tax mailing address. This statement however, is in conflict with the fact that the tax bill for the first half of 1997 was timely paid in January, 1998 as reflected by the record including the Appellant's bank statement and her sworn testimony at the hearing before this Board. (ST 4, 6; R 6, 7, 9). The Tax Commissioner has not presented any evidence or testimony to refute the sworn testimony of Mrs. Middaugh made on behalf of the Appellants. Mrs. Middaugh's testimony is substantiated in part by the documents contained in the statutory transcript.

Several statutory reasons for granting a penalty remission are indicated on the application form and specifically provided for in R.C. 5715.39. The first reason is that the tax was not paid by the due date because of negligence or error by the Auditor or Treasurer. Although the Franklin County Treasurer claims that she did not receive notice of the change of address from the Appellants, this statement is contrary to the sworn testimony presented to the Board. The Appellants have demonstrated an error on the part of the Franklin County Treasurer. The error occurred when the written notice of the Appellants' request for the correction of the mailing address for the tax bill was not acted upon. The Appellants' letter with the request was sent with their tax payment on January 2, 1998, over six months prior to the due date for the tax bill in question. Although the tax payment was timely received and applied for the first half 1997 tax bill, the Treasurer presumably

overlooked the Appellants' written notice of the request for change of address for all future tax bills. This error on the part of the Franklin County Treasurer's office is the basis for the Appellant's request for remission of the statutory penalty imposed.

The issue before the Board in the instant appeal is whether the Tax Commissioner properly denied the Appellants' request for the remission of the late payment penalty assessed by the Franklin County Treasurer. Initially it must be noted 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 the Appellants to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138; *National Tube v. Glander* (1952), 157 Ohio St. 407. The Appellants are assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213. Based upon a thorough review of the record before us, we find that the Appellants established error on the part of the Tax Commissioner in his denial of the requested penalty remission.

As set forth above, the General Assembly does provide for relief from late payment penalties under very the limited circumstances of R.C. 5715.39. We have frequently observed that the Tax Commissioner has no discretion in the imposition of the statutory penalties if the tax is not timely paid, and the specific circumstances of R.C. 5715.39 are not met. In *Frances M. Labuda v. Roger W. Tracy* (June 18, 1993), BTA Case No. 92-M-416, unreported, we observed:

"Like other statutory penalty provisions, R.C. 5715.39 is directive, requiring the Tax Commissioner to impose penalties if the tax remains unpaid. However, unlike other provisions, the Tax Commissioner is given no discretion in the remission of penalties which he is directed to levy against

the late payment of real estate tax. R.C. 5715.39 is specific in defining the circumstances under which late payment penalties may be remitted."

In the instant appeal we acknowledge the Appellants' efforts to promptly make a written address correction request in early 1998 upon receiving the notice and bill from National City Mortgage Company. Despite the statement and recommendation of the Franklin County Treasurer, the evidence presented before this Board substantiates compliance by the taxpayer in giving written notice of the change of address for the tax bills. The record indicates that there was an error on the part of the Franklin County Treasurer in not making the Appellants' requested change. These facts satisfy the first of the four specific statutory provisions for penalty remission. Based upon the foregoing and the record before the Board, it is within our statutory authority to order remission of the penalties imposed.

Accordingly, the denial by the Tax Commissioner of the Appellants' request for remission of penalty is reversed. This matter is hereby remanded to the Tax Commissioner with direction that the tax penalties imposed be removed in accordance with R.C. 5715.39(A) and this decision and order.