

OHIO BOARD OF TAX APPEALS

Amy L. Hodges,)	
)	
Appellant,)	CASE NO. 99-P-1312
)	
vs.)	(PENALTY REMISSION)
)	
James J. Lawrence,)	DECISION AND ORDER
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	- Amy L Hodges 221 East 4 th Street, 1000 Atrium II Cincinnati, Ohio 45202
For the Tax Commissioner	- Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General
State Office Tower	30 East Broad Street, Sixteenth Floor Columbus, Ohio 43215

Entered: December 10, 1999

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

Ms. Hodges appeals a final determination of the tax commissioner in accordance with the provisions of R.C. 5717.02. The tax commissioner denied her application for remission of real property tax penalties. We now consider Ms. Hodges appeal based upon her notice of appeal and the statutory transcript filed by the tax commissioner in accordance with the provisions of R.C. 5717.02. Both Ms. Hodges and the tax commissioner waived their rights to a merit hearing. No briefs have been filed.

Ms. Hodges sets forth the following as assignments of error in her notice of appeal:

“I am writing now to appeal the Tax Commissioner’s decision denying our request for remittance of the penalty we were charged on our Real Estate Property Taxes.

“The Tax Commissioner’s decision was made on June 17th, 1999, and in the same historical way our account has been handled, we did not receive this notice until August 1st, 1999. (Please see attached copy of envelope with postmark of July 31, 1999.)

“We ask now, after this final and blatant error on the part of the taxation department handling this, that our penalty be waived. Our original complaint was not only errors and/or negligence on the part of the auditor or treasurer’s office, but also an error made by the US Post Office. (See #1 and #4 on the Tax Commissioner’s ‘four instances’ allowed for remission of penalties, attached.)

“Thank you in advance for your prompt attention to this matter.”

R.C. 5715.39 sets forth the circumstances in which a real property late payment penalty may be remitted:

"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 corrected tax bill, and the tax payer 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."

The tax commissioner is required to impose a penalty if the tax is not timely paid. In *Frances M. Labuda v. Roger W. Tracy* (June 18, 1993), B.T.A. 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."

Our prior decisions recognize that despite difficult or extenuating circumstances we are limited to our jurisdictional powers as set forth by the General Assembly in the statute. In *Christopoulus v. Tax Commissioner* (October, 1971), B.T.A. Case No. 71-10-2614, unreported, we stated:

"Since the Board of Tax Appeals is a creature of statute and is invested with only the jurisdiction given to it by law, and has no equity jurisdiction, it is obvious that we have no authority to remit the tax penalties, even under * * * distressing circumstances * * * ."

The Ohio Supreme Court has also confirmed that equity does not apply to taxing statutes:

"GM's dilemma is that we have consistently held that equity does not apply to the state as to taxing statutes.

"Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute." *General Motors Corporation v. Limbach* (1993), 67 Ohio St. 3d 90.

Thus we are not free to apply equity as we might see fit. In *Jennings and Churella Construction Company v. Lindley* (1984), 10 Ohio St.3d 67, the Supreme Court stated:

"Appellant cites its previously unblemished tax record and the fact that many assessments originally made in this case were reversed to bolster its argument that an abuse of discretion has occurred. We are not persuaded, however, that the imposition of a five percent penalty constitutes an unreasonable, arbitrary or unconscionable action. The imposition of a penalty is mandatory * * *."

The tax commissioner has made a specific finding that Ms. Hodges failed to meet the conditions established by the General Assembly for the remission of late payment penalties. The findings of the tax commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St. 3d 121. It is incumbent upon Ms. Hodges 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. She is 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.

Mere statements within a pleading such as an application for remission of penalties or a notice of appeal do not rise to the level of evidence:

“A pleading is not admissible into evidence at a hearing to prove a party’s allegations and must not be considered as evidence by the court.” *Felton v. Felton* (1997), 79 Ohio St.3d 34, paragraph 3 of the syllabus.

Even if such statements were viewed as evidence, however, there would still be a factual issue to be determined by the Board. The tax bill was due on June 20, 1997. Ms. Hodges envelope is postmarked June 23, 1997 - - - three days after the due date. This evidence supports the tax commissioner’s finding that payment was mailed beyond the due date. Ms. Hodges claims the envelope was mailed on June 20, 1997, and there was error on the part of the U.S. Post Office. But negligence or error on the part of postal authorities is not specified as a reason to remit penalties in R.C. 5715.39. It might be noted that postal regulations provide for issuance of a “certificate of mailing” under guideline S914, which would be evidence of the date of mailing. See *Weyandt v. Davis* (1999), 122 Ohio App.3d 61, 63.

We conclude Ms. Hodges has failed to satisfy her burden of establishing error on the part of the tax commissioner, and that the tax commissioner merely performed his statutory duty when he assessed a penalty in this matter. Accordingly, and for each of the foregoing reasons, the final determination of the tax commissioner dated the 17th day of June, 1999, must be, and the same hereby is, AFFIRMED.