

FILED/RECEIVED
BOARD OF TAX APPEALS

IN THE SUPREME COURT OF OHIO

2007 JUL 16 PM 2:46

07-1282

Gaspar Township,

Appellant,

vs.

Appeal from the
Ohio Board of Tax Appeals

Preble County
Budget Commission, et al.,

Case No. 2004-T-1152

Appellees.

NOTICE OF APPEAL OF APPELLANT GASPER TOWNSHIP

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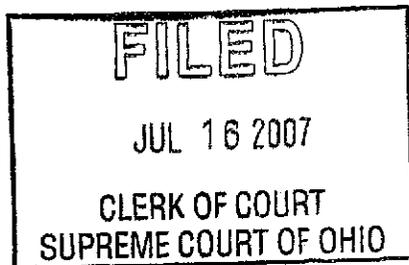
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**Counsel for Appellees Villages of
Eldorado, Gratis, Lewisburg, New
Paris, West Alexandria, West
Manchester and Verona**



NOTICE OF APPEAL OF APPELLANT GASPER TOWNSHIP

Appellant Gasper Township hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in Case No. 2004-T-1152, on June 15, 2007. A true copy of the Decision and Order of the Board being appealed is attached hereto and incorporated herein by reference.

Appellant complains of the following errors in the Decision and Order of the Board of Tax Appeals:

Assignment of Error No. 1

The Board of Tax Appeals erred and was without jurisdiction to vacate its January 26, 2006 merit decision as that decision became final and conclusive as to the merits of Appellant's notice of appeal filed with the BTA upon the expiration of the thirty day appeal period provided in R.C. 5717.04.

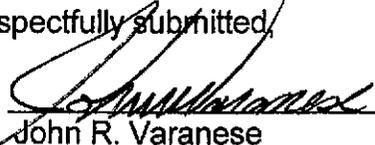
Assignment of Error No. 2

The Board of Tax Appeals erred in dismissing Appellant's notice of appeal for lack of subject matter jurisdiction as Appellant in fact strictly complied with each and every requirement of R.C. 5705.37 in perfecting its appeal to the BTA.

Assignment of Error No. 3

The Board of Tax Appeals erred in finding that Appellant's notice of appeal was not timely filed with the budget commission upon the sworn statements of the auditor and his chief deputy that they were not "served" with the notice of appeal as such statements do not rule out that another auditor employee received the notice of appeal from the county commissioner's office.

Respectfully submitted,

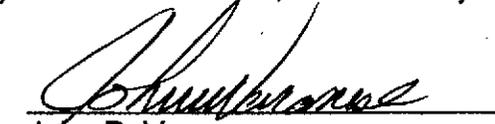
By: 

John R. Varanese

Counsel for Appellant,
Gasper Township

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Gasper Township's Notice of Appeal was served upon the parties noted below by certified U.S. Mail, this 16th day of July, 2007.


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OHIO BOARD OF TAX APPEALS

Gasper Township Board of Trustees,)
)
 Appellant,)
) (BUDGET COMMISSION: ULGF & ULGRAF)
 vs.)
)
 Preble County Budget Commission;)
 Villages of Camden, College Corner,)
 Eldorado, Gratis, Lewisburg, New Paris,)
 Verona, West Alexandria, West Elkton,)
 and West Manchester; and Dixon)
 Township,)
)
 Appellees.)

CASE NO. 2004-T-1152

DECISION AND ORDER

APPEARANCES:

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Entered June 15, 2007

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

The Board of Tax Appeals considers this matter pursuant to two motions. Initially, the budget commission has moved us to dismiss the instant appeal for failure to invoke subject-matter jurisdiction. Specifically, the commission asserts that appellant, Gasper Township (“Gasper”), failed to properly file its notice of appeal with the commission, as required by R.C. 5705.37. The second motion was filed by counsel for the villages of Eldorado, Gratis, Lewisburg, New Paris, West Alexandria, West Manchester and Verona (collectively, “villages”). The villages claim the commission failed to notify them of the filing of the appeal, which resulted in a defective appeal. The villages ask us to dismiss the appeal for a lack of jurisdiction.

The record before us establishes that Gasper filed an appeal with this board on October 15, 2004, challenging the budget commission’s apportionment and distribution of the 2005 ULGF and ULGRAF based upon alternate formulas. After providing the parties an opportunity to present additional evidence at a hearing,¹ we issued a decision in which we found that “no alternative method of apportionment or formula, as authorized by R.C. 5747.53 and 5747.63, was legally effective” for the 2005 distribution. *Gasper Twp. v. Preble Cty. Budget Comm.* (Jan. 27, 2006), BTA No. 2004-T-1152, unreported, at 10. We therefore ordered further proceedings for purposes of allocating the funds under the statutory method prescribed by R.C. 5747.51 and 5747.62. *Id.* at 10.

The budget commission and the villages subsequently filed the subject motions to dismiss. Because we find it determinative, we shall only address the

¹ Although notified by this board, none of the villages appeared at any of the proceedings leading up to our January 27, 2006 decision and order. Subsequently, the villages did appear during the relative need phase of the appeal.

commission's motion.² The commission asserts that Gasper failed to serve a copy of its notice of appeal on the budget commission, as required by R.C. 5705.37. It is undisputed that a copy of Gasper's notice of appeal was sent by certified mail. It is also undisputed that the notice was accepted by Ms. Debra Brock, an employee of the Preble County Commissioners. The parties have further stipulated that no copy of the notice of appeal was served upon the budget commission, the county auditor, county prosecutor, or county treasurer.³ Stipulated Exhibits B through E.

In further support of its motion, the commission presented the testimony of Ms. Brock. Ms. Brock testified that she is employed by the Preble County Commissioners, serving as their receptionist. H.R. at 17. Ms. Brock identified her signature on the certified mail receipt related to the mailing of Gasper's notice of appeal. Appellee's Ex. A. Ms. Brock signed for the mailing on October 18, 2004. She testified, however, that she did not know what was contained in the envelope, nor could she verify how the envelope was addressed. Ms. Brock did state that all mail she

² We note that jurisdictional issues cannot be waived and can therefore be raised at any time during the proceedings. *Jenkins v. Keller* (1966), 6 Ohio St.2d 122; *In re Claim of King* (1980), 62 Ohio St.2d 87; and *Baltimore & Ohio Ry. Co. v. Hollenberger* (1907), 76 Ohio St. 177. Nevertheless, the "failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward." *Gates Mills Investment Co. v. Parks* (1971), 25 Ohio St.2d 16, at 19. Here, despite the considerable amount of litigation involved in this appeal, the budget commission did not raise the issue of subject-matter jurisdiction until well after the issuance of our January 27, 2006 order. As the court eloquently stated in *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, at 284, "It may have been more graceful for the commission to file its motion to dismiss before the partial distribution was ordered, but the commission is not barred by its lack of procedural grace from raising the issue of lack of subject-matter jurisdiction." Similarly, we shall proceed to consider the jurisdictional question raised by the budget commission notwithstanding the procedural awkwardness through which it has been introduced.

³ The budget commission consists of the county auditor, the county treasurer, and the prosecuting attorney. R.C. 5705.27.

receives is turned over to the clerk of the board of county commissioners. H.R. 28. She did not know what happened to the envelope after she passed it on. H.R. at 28.

Ms. Brock additionally testified that mail not clearly addressed to a particular office may occasionally be delivered to her. H.R. at 19. She further stated, however, that there is no general understanding that the postal service is to deliver to her all vaguely addressed mail. H.R. at 24. Ms. Brock is not an employee of the budget commission, the county auditor, county prosecuting attorney, or county treasurer. H.R. at 23. She testified that she has never been authorized to act on behalf of the budget commission or any county official other than the commissioners. H.R. at 23.

The commission also introduced the testimony of Ms. Melinda Robbins, Chief Deputy Auditor of Preble County. Ms. Robbins' duties include maintaining the records of the budget commission. Ms. Robbins testified that the budget commission does not have a fixed office in the county and that each of the commission's members, i.e., the auditor, prosecutor, and treasurer, has his or her own separate office. H.R. at 39. Ms. Robbins also testified that Ms. Brock does not work for the budget commission or the auditor and has never been authorized to accept mailing on the commission's behalf. H.R. at 39. Finally, Ms. Robbins testified that she was not aware of ever having received Gasper's notice of appeal. H.R. at 42.

In response, Gasper argues that it addressed the copy of its notice of appeal to the office of the budget commission and mailed it, by certified mail, on October 15, 2004. Gasper maintains that the sending of the notice of appeal by certified mail "is the functional equivalent of filing in person with the budget commission." Appellant's Brief at 2. Thus, Gasper argues that the notice of appeal must be deemed

filed the moment the notice is in the possession and control of the United States Postal Service. Pursuant to its argument, Gasper believes it met all of its filing duties once the notice of appeal, addressed to the budget commission, was placed into the certified mail. Gasper represents that it does not bear the risk of any failure by the USPS to actually deliver the notice of appeal to the commission.

The appeal concerns the apportionment and distribution of the 2005 Undivided Local Government Fund (ULGF) and the 2005 Undivided Local Government Revenue Assistance Fund (ULGRAF). A subdivision may appeal the budget commission's action relative to the apportionment of the funds under R.C. 5747.55, which provides that the appeal is to be made "in the manner and with the effect provided in section 5705.37 of the Revised Code."

R.C. 5705.37 provides the requirements for an appeal to this board from the actions of a budget commission:

*"The taxing authority of any subdivision that is dissatisfied with any action of the county budget commission may, through its fiscal officer, appeal to the board of tax appeals within thirty days after the receipt by the subdivision of the official certificate or notice of the commission's action. *** An appeal under this section shall be taken by the filing of a notice of appeal, either in person or by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, with the board and with the commission. If notice of appeal is filed by certified mail, express mail, or authorized delivery service, date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. Upon receipt of the notice of appeal, the commission, by certified mail, shall notify all persons who were parties to the proceeding before the commission of the filing of the notice of appeal and shall file proof of notice with the board of tax appeals. ***" (Emphasis added.)*

Generally, “[t]he right to appeal an allocation of a local government fund to the Board of Tax Appeals is created by statute. (R.C. 5747.55.) Therefore, if appellant has failed to comply with the appropriate statutory requirements, the board lacks subject-matter jurisdiction to hear the appeal.” *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, at 284. See, also, *Cincinnati v. Hamilton Cty. Budget Comm.* (1979), 59 Ohio St.2d 43, and *Budget Comm. of Brown Cty. v. Georgetown* (1986), 24 Ohio St.3d 33. Ohio tribunals have clearly established that “*** [w]here a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred.” *American Restaurant and Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 150. See, also, *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 581. See, also, *Union Twp. v. Butler Cty. Budget Comm.* (1995), 101 Ohio App.3d 212, at 216, discretionary appeal denied (1995), 72 Ohio St.3d 1551 (holding that failure to comply with the statutory filing requirements for an appeal to the BTA from a budget commission “impairs the BTA’s subject-matter jurisdiction”).

R.C. 5705.37 requires the “filing” of a notice of appeal to vest the BTA with jurisdiction. The Ohio Supreme Court has defined the term “filed” to require the actual delivery of the item into the custody and control of the addressee. *Fulton v. State, ex rel. General Motors Corp.* (1936), 130 Ohio St. 494, at paragraph one of the syllabus. Under this definition, the mailing of an item is not, in and of itself, sufficient to constitute a filing. The item must be timely received to be considered “filed”:

“The act of mailing was but the initial step taken in the process of transmission of the claim and did not constitute a ‘filing.’ The date of mailing is therefore immaterial. The fact

which is controlling is the time of actual delivery of the claim into the official custody and control of the Superintendent of Banks, for it was then that the claim was filed.” Id. at 500.

In *Blue Ash Partners v. Hamilton Cty. Bd. of Revision* (Oct. 17, 1997), BTA No. 1995-T-1384, unreported, we determined that a notice of appeal from a county board of revision was not considered “filed” upon mailing by certified mail. Relying upon *Fulton*, supra, we held that the notice of appeal must nevertheless be received in order to be considered filed. In short, we found that the actual filing of the notice of appeal is a jurisdictional prerequisite to an appeal before us and that substantial compliance with the appeal statute, i.e., the mere placing of the appeal in the mail by certified mail, is insufficient.

Later, in *Mercantile Stores Company, Inc. v. Tracy* (Mar. 27, 1998), BTA No. 1997-A-256, unreported, affirmed (Nov. 2, 1998), 12th Dist. No. CA98-04-085, we applied *Blue Ash*, supra, to appeals filed from the final determinations of the Tax Commissioner:

“The provision in R.C. 5717.02, upon which the appellant relies does not obviate the requirement that the document in fact, be received by the Board and the Tax Commissioner. It only establishes the deemed date of filing, if certified mail delivery is selected as the method of service. We reject as untenable the appellant’s contention that actual receipt of the notice of appeal by the Tax Commissioner is no longer required, and the postal employee is the Tax Commissioner’s agent for purposes of completing service. *Blue Ash Partners v. Hamilton Cty. Bd. of Revision* (October 17, 1997), B.T.A. No. 95-T-1384, unreported.

“The use of mail service presupposes that the document is properly addressed and sufficient postage is placed upon the document. The taxpayer has the sole responsibility to accomplish a timely filing of the notice of appeal with the

proper parties. *The risk of improper service rests with the taxpayer.*" (Emphasis added.) *Mercantile*, supra, at 5.

Here, the question of whether the copy of Gasper's notice of appeal was placed into the mail, certified or otherwise, adds little to our disposition of this matter. Under R.C. 5705.37, the mere mailing of the notice of appeal does not satisfy the requirements for vesting this board with jurisdiction. The certified mail provisions of the statute only provide that the notice will be treated as being filed on the "date of the United States postmark placed on the sender's receipt by the postal service ***." The provision thus addresses only the timeliness of the filing. It is still necessary that both the Board of Tax Appeals and the budget commission actually receive the notice. *Blue Ash* and *Mercantile*, supra.

Gasper maintains that it properly addressed its notice of appeal to the budget commission. However, the record establishes that the budget commission did not receive the notice of appeal at any time prior to the close of the appeal period, as required by R.C. 5705.37. The failure to file the notice of appeal with the budget commission is jurisdictional and will properly lead to the dismissal of the appeal. *Painesville, Cincinnati*, and *Budget Comm. of Brown Cty.*, supra. Cf. *Austin Co. v. Cuyahoga Cty. Bd. of Revision* (1989), 46 Ohio St.3d 192.

We do acknowledge that Preble County does not maintain a separate office for the budget commission. Ms. Robbins acknowledged that the auditor's office does accept mailings on behalf of the commission. H.R. at 42. In this regard, we note that R.C. 5705.27 provides that the county auditor shall be the secretary of the budget commission. Thus, we agree that, if there was no separately maintained office for the

budget commission, Gasper could have filed its notice of appeal with the auditor. See *Salem Med. Arts & Dev. Corp. v. Columbiana Cty. Bd. of Revision* (1998), 80 Ohio St.3d 621, at 624. See, also, *Phoenix Dye Works v. Cuyahoga Cty. Bd. of Revision* (Sept. 6, 1985), BTA No. 1984-D-660, unreported. The evidence before us, however, establishes that neither the auditor nor any other member of the budget commission received a copy of Gasper's notice of appeal.

Upon review, we find that Gasper failed to timely file a copy of its notice of appeal with the budget commission, as required by R.C. 5705.37. We thus lack subject-matter jurisdiction over this appeal. As a consequence of our determination, we order that our January 26, 2006 decision and order, in which we invalidated the alternative method of apportionment used for the 2005 ULGF and ULGRAF, must be, and the same hereby is, vacated.

As Gasper failed to properly perfect an appeal to the Board of Tax Appeals, we dismiss BTA No. 2004-T-1152.

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