

IN THE SUPREME COURT OF OHIO

Gaspar Township Board of Trustees,

Appellant,

vs.

Preble County
Budget Commission, et al.,

Appellees.

Case No. 07-1282

Appeal from the
Ohio Board of Tax Appeals
Case No. 2004-T-1152

MERIT BRIEF OF APPELLANT GASPAR TOWNSHIP BOARD OF TRUSTEES

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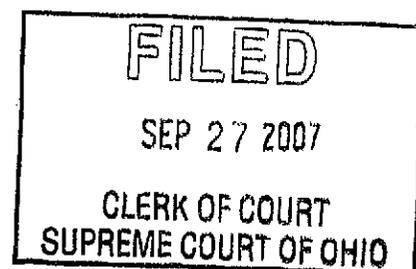


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STATEMENT OF FACTS

This appeal is before the Court on Appellant Gasper Township Board of Trustees' (hereafter Gasper) timely filed appeal of the Board of Tax Appeal's June 15, 2007 decision and order which dismissed Appellant's notice of appeal challenging the Preble County Budget Commission's (hereafter budget commission) apportionment and distribution of the 2005 ULGF and ULGRAF for lack of subject matter jurisdiction. The BTA's June 15, 2007 decision and order also vacated its January 26, 2006 decision and order which held that the Preble County Budget Commission's allocation and distribution of the 2005 funds under an alternative formula was invalid as it was not properly adopted and approved as required by R.C. 5747.53 and 5747.63.

On October 15, 2004, Gasper filed its notice of appeal with the BTA challenging the budget commission's allocation and distribution of the 2005 ULGF and ULGRAF. After an evidentiary hearing, the BTA ruled that the budget commission's 2005 allocation and distribution of the funds was unlawful as the alternate formula used by the budget commission was not properly adopted and approve as required by R.C. 5747.53 and 5747.63. Pursuant to an earlier issued bifurcation order, the BTA retained jurisdiction to schedule a later hearing to determine the amounts to be allocated to the parties to the appeal under the statutory method pursuant to R.C. 5747.51 and 5747.62.

Before a statutory allocation hearing could be held, the budget commission and Village Appellees filed motions to dismiss Gasper's notice of appeal. The BTA only considered the budget commission's motion as it considered that motion determinative. The budget commission's motion to dismiss asserted that the BTA was without jurisdiction to consider Gasper's notice of appeal because the notice of appeal was not filed with it as

required by R.C. 5705.37. The BTA scheduled an evidentiary hearing on the motions at which time it heard the testimony of the Preble County Chief Deputy Auditor and the Preble County Commissioners' receptionist. The parties stipulated that the individual members of the budget commission and the chief deputy auditor were never served with Gasper's notice of appeal. The parties also stipulated that the Gasper Township Fiscal Officer mailed the notice of appeal by certified mail to the BTA and budget commission on October 15, 2004.¹

In its decision, the BTA found that Gasper's notice of appeal was sent by certified mail and signed for by the Preble County Commissioners' receptionist, although she did not know what became of the certified mail containing Gasper's notice of appeal. Considering the evidence presented and construing the requirements of R.C. 5705.37 and its own decisions, the BTA granted the budget commission's motion to dismiss and dismissed Gasper's notice of appeal for lack of subject matter jurisdiction.

On July 16, 2007, Gasper filed the instant appeal of the BTA's June 15, 2007 decision and order dismissing its notice of appeal for lack of subject matter jurisdiction.

¹ This stipulation pertained to the affidavit of the Gasper Township Fiscal Officer filed with the BTA and admitted at the hearing. See Supplement p. 1. The only portion of the affidavit not stipulated to was that part paragraph 3 which stated the notice of appeal was addressed to the "Preble County Budget Commission," because the certified mail receipt for this mailing which was an exhibit to the affidavit had "PC Budget Commission" written on it.

ARGUMENT

PROPOSITION OF LAW NO. 1

Where an Appellant files a notice of appeal pursuant to R.C. 5705.37 by certified mail and properly addresses the notice of appeal to a county budget commission, and complies in all other respects with the statutory requirements for perfecting an appeal to the BTA, it will not be penalized for failure of the postal service to deliver the certified mail containing the notice of appeal to the budget commission.

This Court has consistently held that, "[a]n appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements." *Zier v. Bur. of Unemployment Comp.* (1949), 151 Ohio St. 123, paragraph one of the syllabus; see, also, *Griffith v. J.C. Penney Co.* (1986), 24 Ohio St.3d 112. The single issue for review by the Court is whether Gasper strictly complied with the requirements imposed upon it by R.C. 5705.37 in order to perfect its appeal to the BTA. R.C. 5705.37, provides, in pertinent part, as follows:

"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 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 [5703.05.6] 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. * * **" (Emphasis added.)

R.C. 5705.37 authorized Gasper to file its notice of appeal with the budget commission either in person or by certified mail. Gasper chose to file the notice of appeal by certified mail. The only affirmative duty imposed upon Gasper in R.C. 5705.37 was that it deliver the notice of appeal, properly addressed to the budget commission, to the postal service for certified mail filing prior to the expiration of the thirty day appeal period. Gasper strictly adhered to this requirement and there is no evidence in the record suggesting otherwise.²

Whether the certified mail containing Gasper's notice of appeal was addressed to the *PC Budget Commission* or the *Preble County Budget Commission* is immaterial as there is only one budget commission at *Courthouse, 2nd Floor, Eaton, Ohio 45320*.³ Under R.C. 5705.37, Gasper did all that it could possibly do to secure its right of appeal and cannot be prejudiced by the failure of the postal service to ensure delivery or the negligent act of the Preble County Commissioners' receptionist who testified that she signed for the certified mail containing Gasper's notice of appeal.

In its decision, the BTA ruled that R.C. 5705.37 requires the "filing" of a notice of appeal with the budget commission to vest the BTA with jurisdiction. The BTA relied on *Fulton v. State ex rel. General Motors Corp.* (1936), 130 Ohio St. 494 to support its construction of the term "filed" as used in R.C. 5705.37. *Fulton* involved whether a claim for preference against a liquidator of a bank's assets was timely filed when it was deposited in the mail or received by the state superintendent of banks. The issue before

² See Lauvon Mantle Affidavit and attached exhibits at Supplement p. 1

³ The record is replete with the county auditor's office letterhead which denotes an address of "Courthouse, 2nd Floor, Eaton, Ohio 45320."

the *Fulton* court was the proper construction of the term "filed" as used in former Section 710-98a, General Code, which provided as follows:

"No claim for preference shall be allowed by the superintendent of banks or approved by the court unless the same is verified by an affidavit or affidavits fully disclosing all facts upon which said claim is based. All such claims must be filed with the superintendent of banks on or before three months after the last publication of notice required by the second sub-paragraph of section 710-90 of the General Code, and if not so filed the owner or owners thereof shall be forever barred from asserting the same in any manner as entitled to preference."

The *Fulton* court ruled that "filing" meant when the claim was actually received by the state superintendent of banks in order to be considered timely. *Id.*, 130 Ohio St. at 500. The "filing" in *Fulton* was fundamentally different from the type of filing at issue in the present appeal. This appeal involves filing under R.C. 5705.37, which specifically contemplates constructive filing when the notice of appeal is presented to and accepted by the postal service for filing by certified mail. The statute at issue in *Fulton* did not contain language permitting constructive filing by certified mail as does R.C. 5705.37, and so cannot be the last word on whether Gasper strictly complied with this statute's terms.

The BTA also cited two of its own decisions in further support of its ruling that "filing" means actual delivery to the budget commission. In *Blue Ash Partners v. Hamilton Cty. Bd. of Revision* (Oct. 17, 1997) BTA No. 1995-T-1384, unreported, the Appellant could not produce the postal service's date stamped sender's receipt for the certified mailing containing its notice of appeal mailed to a county board of revision but did offer testimony that the notice of appeal was timely mailed certified at the post office. The BTA ruled that the county had successfully rebutted the Appellant's testimony that it mailed a copy of its notice of appeal by certified mail through its own testimony that it had never received the notice of appeal. Unlike *Blue Ash*, Gasper's evidence does include the a

date-stamped sender's receipt for the certified mailing containing Gasper's notice of appeal mailed to the budget commission. For this reason *Blue Ash* is distinguishable from the instant appeal.

In *Mercantile Stores v. Tracy* (Mar. 27, 1998), BTA No. 1997-A-256, unreported, affirmed (Nov. 2, 1998), Butler App. No. CA98-04-85, unreported, the Appellant incorrectly addressed a certified mailing containing its notice of appeal intended to be filed with the Tax Commissioner. The certified mailing in *Mercantile* listed the Tax Commissioner as the receiver, but listed the delivery address as the 24th floor of the State Office Tower in Columbus, Ohio, which is where the BTA's offices are located. The BTA signed for the certified mail containing the appellant's notice of appeal and filed it as an appeal to the BTA. On a motion to dismiss, the BTA ruled that the notice of appeal had not been timely filed with the Tax Commissioner and dismissed the appeal. Unlike *Mercantile*, the evidence of record in the present appeal establishes that Gasper's timely certified mailing containing its notice of appeal was correctly addressed to the budget commission, although signed for by the receptionist for the Preble County Board of Commissioners.

That the issue of the filing of the notice of appeal in *Mercantile* with the Tax Commissioner would have been decided differently by the Twelfth District Court of Appeals had the certified mailing been correctly addressed to the Tax Commissioner is apparent from the appellate court's decision which stated, "[w]e agree with *Mercantile* that one logical purpose of using the date of the United States postmark as the date of filing is that a litigant should not be punished for a problem in delivering the mail. However, in order to receive the benefit of R.C. 5717.02, it is incumbent upon the sender to provide the

correct address." *Mercantile Stores v. Tracy* (Nov. 2, 1998), Butler App. No. CA98-04-085, unreported.

In *Hampton v. Zaino* (Oct. 24, 2003), BTA No. 2003-A-626, unreported, the BTA adopted the above reasoning of the court of appeals in *Mercantile* that a litigant should not be punished for a problem in delivering the mail when it ruled that it had jurisdiction over a notice of appeal from a decision of the Tax Commissioner.⁴ In *Hampton*, the appellant's notice of appeal was sent by certified mail and properly addressed to the Tax Commissioner, but was misdelivered to the BTA and filed by it as an appeal. The BTA ruled that the appellant had complied with all the statutory requirements of R.C. 5717.02⁵ in perfecting its appeal and that it had jurisdiction to entertain the merits of the appeal. *Id.*, at p. 2, footnote 1. The instant appeal is identical to the situation presented *Hampton* as the evidence of record shows that Gasper's otherwise timely and properly addressed certified mailing containing its notice of appeal was misdelivered by the postal service which prevented its filing with the budget commission.

In all of the cases cited by the BTA in its decision, not one involved the circumstances presented in the instant appeal where a properly addressed certified mailing containing a notice of appeal was misdelivered by the postal service preventing its filing with the statutorily designated office. Notably, the appellate court's decision in *Mercantile* suggests that dismissal is unwarranted if the appellant has properly addressed the certified mailing containing its notice of appeal and the postal service misdelivers the

⁴ A copy of this unreported decision is included at Appendix p. 14.

⁵ The certified mail filing of a notice of appeal under R.C. 5717.02 is in all material respects identical to R.C. 5705.37.

mailing. Finally, in *Hampton*, the BTA in fact ruled that an appellant properly perfects its appeal and secures the board's jurisdiction when it properly addresses a certified mailing containing its notice of appeal even though filing with the Tax Commissioner is frustrated by the postal service's misdelivery of the certified mailing.

The precise issue presented in this appeal has never been determined by this Court and no case law, other than the BTA's *Hampton* decision, directly addresses the issue presented. It is common knowledge that properly addressed mail is sometimes misdelivered. The General Assembly was aware that misdelivery of the certified mailing under R.C. 5705.37 was possible, but authorized it as a filing method on equal footing with in-person filing. It did not authorize certified mail filing under R.C. 5705.37 with the caveat that the BTA's jurisdiction over the notice of appeal was at risk because of the possibility of misdelivery.

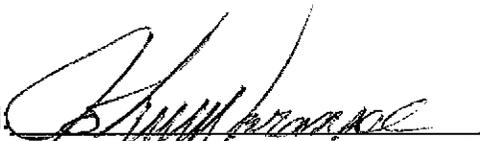
The court of appeals in *Mercantile* recognized that misdelivery of a correctly addressed certified mailing was beyond the control of an appellant and did not warrant dismissal of the appeal. The logic of the court of appeal's reasoning is apparent in that a timely and properly addressed certified mailing is an affirmative act performed by and within the control of an appellant whereas the postal service's delivery is not. Simply put, how can an appellant be held to ensure delivery of the certified mailing containing its notice of appeal when it is not in control of the process of delivery? In this case, R.C. 5705.37 did not require Gasper to perform the affirmative act of delivering the certified mailing containing its notice of appeal to the budget commission. The performance of the affirmative act of delivery, per R.C. 5705.37, rested with the postal service. In sum, the Court should adopt the reasoning of the court of appeals in *Mercantile* and the holding of

the BTA in *Hampton* and rule that Gasper adhered to the affirmative requirements of R.C. 5705.37 within its control and imposed upon it for filing its notice of appeal by certified mail with the budget commission.

Conclusion

Based upon all of the foregoing, the Court should rule that Gasper performed the affirmative requirements imposed upon it by R.C. 5705.37 and reverse the decision of the BTA as being unlawful and contrary to law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of Appellant Gasper Township Board of Trustees' Merit Brief was served upon the counsel for the parties listed below by ordinary U.S. mail, postage prepaid, at the addresses so noted on this 27th day of SEPTEMBER, 2007.



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APPENDIX

IN THE SUPREME COURT OF OHIO

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Gasper Township,

Appellant,

vs.

Preble County
Budget Commission, et al.,

Appellees.

07-1282

Appeal from the
Ohio Board of Tax Appeals

Case No. 2004-T-1152

NOTICE OF APPEAL OF APPELLANT GASPER TOWNSHIP

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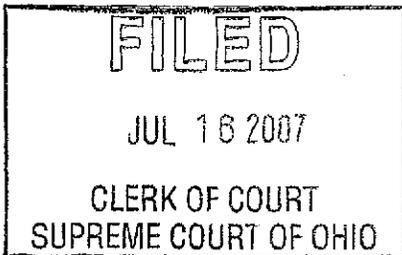
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Manchester and Verona**



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,

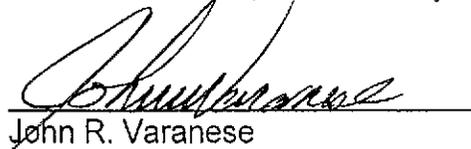
By: _____

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Counsel for Appellant,
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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,)	
)	CASE NO. 2004-T-1152
Appellant,)	
)	(BUDGET COMMISSION: ULGF & ULGRAF)
vs.)	
)	DECISION AND ORDER
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.)	

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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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§ 5705.37**Statutes & Session Law****TITLE [57] LVII TAXATION****CHAPTER 5705: TAX LEVY LAW****5705.37 Appeal to board of tax appeals.****5705.37 Appeal to board of tax appeals.**

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. In like manner, but through its clerk, the board of trustees of any public library, nonprofit corporation, or library association maintaining a free public library that has adopted and certified rules under section 5705.28 of the Revised Code, or any park district may appeal to the board of tax appeals. 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. The secretary of the commission shall forthwith certify to the board a transcript of the full and accurate record of all proceedings before the commission, together with all evidence presented in the proceedings or considered by the commission, pertaining to the action from which the appeal is taken. The secretary of the commission also shall certify to the board any additional information that the board may request.

The board of tax appeals, in a de novo proceeding, shall forthwith consider the matter presented to the commission, and may modify any action of the commission with reference to the budget, the estimate of revenues and balances, the allocation of the library and local government support fund, or the fixing of tax rates. The finding of the board of tax appeals shall be substituted for the findings of the commission, and shall be certified to the tax commissioner, the county auditor, and the taxing authority of the subdivision affected, or to the board of public library trustees affected, as the action of the commission under sections 5705.01 to 5705.47 of the Revised Code.

This section does not give the board of tax appeals any authority to place any tax levy authorized by law within the ten-mill limitation outside of that limitation, or to reduce any levy below any minimum fixed by law.

Effective Date: 09-29-2000

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OHIO BOARD OF TAX APPEALS

Curtis Hampton,)	
)	
Appellant,)	CASE NO. 2003-A-626
)	
vs.)	(PERSONAL INCOME TAX)
)	
Thomas M. Zaino, Tax Commissioner)	DECISION AND ORDER
of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	Curtis Hampton, pro se 746 Archer Road Bedford, Ohio 44146
For the Appellee	-	Jim Petro Attorney General of Ohio Barton Hubbard Assistant Attorney General State Office Tower 30 East Broad Street, 16 th Floor Columbus, Ohio 43215

Entered October 24, 2003

Ms. Jackson, Ms. Margulies, and Mr. Eberhart 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 personal income tax assessment against appellant relating to tax year 2000.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the board by the Tax Commissioner, the evidence and testimony presented at a hearing before this board, and the post hearing brief filed by appellant.¹

In reviewing appellant's appeal, we first 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 that 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.

In the instant matter, appellant appeals from the Tax Commissioner's final determination, which states, in regard to the assessment in question, as follows:

"The petitioner submitted his IT-1040 reporting '0' as his Federal Adjusted Gross Income ('FAGI') and \$4,986.00 in overpaid taxes. On the petitioner's W-2, his employer, Ford Motor Company, reported substantial wages in box 1 as federal 'wages, tips, other compensation' and in box 17 as 'State or local wages, tips, etc.', and \$4,986.39 as 'State or local income tax withheld.' While the petitioner's W-2

¹Although the commissioner initially raised a question regarding this board's jurisdiction in this matter, based upon evidence and testimony presented at the merit hearing, we find that appellant has sufficiently invoked our jurisdiction. Specifically, a copy of appellant's notice of appeal was sent by certified mail, properly addressed to the commissioner, but inadvertently delivered to this board and filed on May 22, 2003. As appellant has complied with all of the statutory requirements in R.C. 5717.02 regarding perfecting an appeal from a final determination of the Tax Commissioner, we find that this board has jurisdiction to determine the merits of appellant's appeal.

reported substantial wages, none were reported on the petitioner's U.S. 1040A or reflected on the Ohio IT-1040. Consequently, the petitioner was assessed a \$500.00 penalty pursuant to R.C. 5747.15(A)(5).

"The petitioner makes several contentions and these are addressed below.

"First, the petitioner contends that his Ohio Adjusted Gross Income ('OAGI') was correctly stated as zero on the return, because he reported FAGI on his federal return as zero, and pursuant to the Ohio instruction booklet, OAGI is required to be the same number as FAGI that was reported. ***

"The petitioner next contends that the assessment of the \$500.00 penalty denied him due process of law because by assessing the penalty, the Ohio Department of Taxation took his property without giving him the opportunity to address the issue. ***

"The petitioner next contends that any document that is sent by an accuser or a person seeking information requires a signature. Since the petitioner claims the Ohio Department of Taxation is accusing the petitioner of improperly filing his return resulting in a penalty assessment, the Ohio Department of Taxation is an accuser and the assessment must contain the Tax Commissioner's signature. ***

"The petitioner next contends that the use of 'Pat Jeffries' to sign documents is fraudulent and not allowed. ***

"The petitioner also contends that if there is no duly promulgated rule to implement the Ohio Revised Code section regarding the penalty, R.C. 5747.15(A)(5), then, regardless of what the Ohio Revised Code requires, the statute is void for vagueness and invalid. ***

In his notice of appeal from the foregoing decision of the Tax Commissioner, Curtis Hampton ("Mr. Hampton"), specified the following errors:

"1. Assessment of \$500.

"2. Basis on which R.C. 5747.02 applies to Mr. Hampton, and taxation of individual in spite of Constitution of the State of Ohio., p. 37 'Poll Tax.' See Black's Law Dictionary, 7th Ed. p. 1471.

"3. Definition of the term 'gross income' is inadequate as support for taxing wages. The term 'Compensation for services' is listed as a source of income.

"4. It is a principle of ethics that a man ought not to be a judge in his own cause. In this respect, both unreported cases pertaining to Mr. Zaino and Mr. Tracy are questionable as reliable sources.

"5. The blatant statement 'Compensation for services is taxable income' is unsubstantiated.

"6. The term 'wage income' is semantical.

"7. There is no 1913 federal tax code to which the petitioner could have made reference, or described its development. As far as reference to the Sixteenth Amendment to the Constitution of the United States, the law made in pursuance thereof is in question.

"8. As for 'semantical maneuvering' the petitioner carefully read the available instructions in both the 1040A Instruction booklet and the IT 1040 State Return.

"9. The contention that the assessment of \$500.00 penalty could not have denied petitioner due process of law. However, seizing the assessed amount without due process at law would be contended.

"10. The petitioner never sought a hearing. The hearing he attended was an ultimatum.

“11. The issue of signing an accusation was introduced by another individual, but was not contested by Mr. Allamby nor Mr. Hampton.

“12. The use of ‘Pat Jeffries’ as an accuser denies petitioner to challenge accuser before a court of law.

“13. The bald and unsubstantiated claim that the petitioner’s contentions are without legal merit is in itself baseless.”

Initially, we note that Mr. Hampton was assessed pursuant to R.C.

5747.15(A)(5) which provides:

“(5) If a taxpayer *** files what purports to be a return required by this chapter that does not contain information upon which the substantial correctness of the return may be judged or contains information that on its face indicates that the return is substantially incorrect, and the filing of the return in that manner is due to a position that is frivolous or a desire that is apparent from the return to delay or impede the administration of the tax levied by section *** 5747.02 *** of the Revised Code, a penalty of up to five hundred dollars may be imposed.”

At the hearing before this board, as well as in his post-hearing brief, Mr. Hampton (and his witness, Mr. Michael Allamby) essentially reiterated his position, as set forth in his notice of appeal, but concentrated solely on the question of whether Mr. Hampton’s tax year 2000 return was completed properly and how he had determined his tax liability was zero. Accordingly, since appellant has not addressed his other unrelated specifications of error, we will consider them withdrawn.

Specifically, we note that Mr. Hampton was employed in Ohio by the Ford Motor Company during the assessed period. (S.T., p. 27) Mr. Hampton filed an Ohio IT-1040 income tax return for the tax year in question, 2000. (S.T., p. 25) On

such return, Mr. Hampton indicated that he had no federal adjusted gross income, and attached the “Form W-2, Wage and Tax Statement” and a “National Income Tax Return” statement. (S.T., p. 27, 28) Contrary to the information reported by Mr. Hampton on his tax return, his W-2 indicates that he received wages, tips, and other compensation in 2000 in the amount of \$94,626.37.

We first note, as this board has held on numerous occasions, that:

“(A)n Ohio taxpayer’s income tax liability is measured on the basis of the taxpayer’s adjusted gross income. *Derry v. Lindley* (1979), 57 Ohio St.2d 5. While the term ‘income’ is not separately defined by the Revised Code, R.C. 5747.01(A) defines the terms ‘adjusted gross income’ [and ‘Ohio adjusted gross income’] as having the same meaning as when used in the Internal Revenue Code, subject to certain adjustments not in issue in this matter. ‘Adjusted gross income,’ as used in the Internal Revenue Code, refers to ‘gross income’ modified by certain deductions not here in issue. 26 U.S.C. 62(a).

“The Internal Revenue Code defines ‘gross income’ at 26 U.S.C. 61(a):

“Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

“(1) Compensation for services, ***”

Welch v. Zaino (July 20, 2001), BTA No. 2000-T-960, unreported. See, also, *Welch v. Zaino* (May 23, 2003), BTA No. 2002-A-1204, unreported; *Tyler v. Zaino* (Apr. 25, 2003), BTA No. 2002-V-1310, unreported; *Persun v. Zaino* (Feb. 14, 2003), BTA No. 2002-R-1080, unreported.

Thus, we find that the Tax Commissioner properly used the figures listed on Mr. Hampton’s federal withholding statement as the basis for determining his

federal and Ohio adjusted gross income. Accordingly, based upon the foregoing, this board finds that appellant has not overcome the presumption of validity of the Tax Commissioner's determination. See *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66. We find that the Tax Commissioner's findings were not unreasonable and unlawful. 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.

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