

IN THE SUPREME COURT OF OHIO

**GASPER TOWNSHIP
BOARD OF TRUSTEES,**

Appellant,

Case No. 07-1282

v.

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

**PREBLE COUNTY
BUDGET COMMISSION, et al.,**

Appellees.

MERIT BRIEF OF APPELLEE BUDGET COMMISSION

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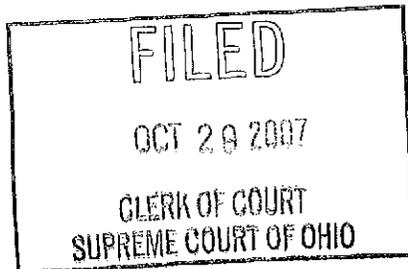


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ARGUMENT

PROPOSITION OF LAW NO. 1

The Board of Tax Appeals correctly dismissed Appellant's appeal because Appellant failed to file a copy of a Notice of Appeal with Appellee Budget Commission as required by R.C. 5705.37, and, thus, the Board of Tax Appeals lacked subject matter jurisdiction.

Taxing authorities of political subdivisions dissatisfied with a decision of their county budget commission may appeal such a decision by complying with R.C. 5705.37, which states, 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 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 [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. * * * ”

R.C. 5705.37. As Appellant's Merit Brief correctly stated, “[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. Put another way, failure to comply with the statutory filing requirements for an appeal to the Board of Tax Appeals (“BTA”) from a budget commission impairs the BTA's subject matter jurisdiction. *City of Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, at 284. Therefore, in order for the BTA to have subject matter jurisdiction over the 2005 appeal of the local government fund allocation, Appellant must have strictly complied with R.C 5705.37. *id.* Appellee Budget Commission contends, and as the BTA decided, Appellant failed to do so as its October 15, 2004 mailing of its Notice of Appeal was

never delivered to Appellee Budget Commission, its members, or its clerk. Rather, on October 18, 2004, Appellant's mailing was delivered to, and received by, Debra Brock, an employee of the Preble County Board of Commissioners. Additionally, the Notice of Appeal was never forwarded to Appellee Budget Commission, its members, or its clerk. It should be noted that, as of the date of this filing, the whereabouts of said Notice are still unknown. Because Appellant's Notice of Appeal was never delivered to Appellee Budget Commission, and as delivery or receipt by the proper office or public official is an integral step to filing, no "filing" could have taken place. Without a "filing", Appellant cannot be deemed to have strictly complied with R.C. 5705.37. And, failure to strictly comply with the statute strips the BTA of its subject matter jurisdiction. Accordingly, Appellant's 2005 appeal of the allocation of the local government fund was properly dismissed by the BTA in its June 15, 2007 Decision.

The crux of the issue before the Court today is the definition of the term "filing" as used in R.C. 5705.37. The term "filing" is not defined by R.C. 5705.37. Nor is it defined within the general definitions applying to Ohio's Taxation statutes. See R.C. Chapter 5701. Accordingly, words not statutorily defined shall be "construed according to the rules of grammar and common usage". R.C. 1.42.

The term "filed" has been defined 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. In doing so, the *Fulton* court stated, "[t]he act of mailing was but the initial step taken in the process of transmission of the claim and did not constitute a 'filing'." *Id* at 500. *Fulton* examined not only Webster's, Funk & Wagnall's, and Bouvier's dictionaries to define a common usage, but also relied on the United States Supreme Court which held that "a paper is filed when it is delivered to the proper official and by him received and filed". *United States v.*

Lombardo, 241 U.S. 73, 76, 60 L.Ed. 897, 898, 36 S.Ct. 508, 510 (1916). Appellant's October 15, 2004 mailing was never delivered to or received by Appellee Budget Commission.

Therefore, using the definition of the term under *Fulton* and *Lombardo*, no "filing" took place.

Appellant's Merit Brief points out the differences between the statute considered in *Fulton*, former Section 710-98a General Code, and the statute currently before this Court, R.C. 5705.37. The statute in *Fulton* required preference claims to "be filed with the superintendent of banks on or before three months after the last publication of notice...". Former Section 710-98a General Code. There was no allowance for the use of a postmark to establish a constructive filing date for the preference claim to relate-back to once it was delivered. In other words, the preference claim had to be in the door of the superintendent of banks before the three months expired or it was untimely. In contrast, R.C. 5705.37 specifically permits the use of "certified mail, express mail, or authorized delivery service" and that the "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". These differences are immaterial unless we accept Appellant's argument that authorization in R.C. 5705.37 of the use of certified or express mail somehow eliminates or overrules the delivery and receipt requirements of a "filing" as established in *Fulton* and *Lombardo*. It is not necessary to do so as R.C. 5705.37 can easily be interpreted in harmony with the requirements of *Fulton* and *Lombardo*. Simply put, once a notice of appeal is delivered to and received by the BTA or a budget commission, the postmark may then be used to constructively establish a filing date for said notice. The Statute itself undercuts Appellant's argument that actual receipt of a notice of appeal is a condition precedent to further action by the budget commission. While Appellant may have mailed its Notice of Appeal on October 15, 2004, it was never delivered to or received

by Appellee Budget Commission. Rather, as the parties have stipulated, the signature on the return receipt was that of Debra Brock, employee of the Board of County Commissioners, who does not know what came of Appellant's mailing. Even though Ms. Brock did receive the mailing, she was not a member, employee, agent or otherwise authorized to receive service or filings for Appellee Budget Commission. Where a statute requires the filing of a notice with a particular agency or officer, filing with a different agency or office does not comply with the statutory mandate. *Kenny v. Evatt, Tax Commr.* (1945), 144 Ohio St. 329.

An issue implicitly raised in Appellant's brief is that of the regularity of the delivery of the mails. Appellant's argument rests upon an assumption that once an envelope is placed in the custody of the Postal Service, its appeal is perfected. It is axiomatic to state that there is indeed a presumption of the regularity of mail delivery to the addressee. However, Ohio's court files are replete with *Civ.R.* 60(B) motions successfully rebutting that presumption. An analogy to this issue most people have experience with, the annual mad dash to the post office on April 15th, can be found in the US Tax Code. The federal courts exercise jurisdiction over suits for the refund of federal taxes pursuant to 28 U.S.C. §1346(a)(1), together with 26 U.S.C. §7422, which provides that a taxpayer may not maintain a court action to recover a refund of income tax "alleged to have been erroneously or illegally assessed or collected...until a claim for refund or credit has been duly filed... ." 26 U.S.C. §7422(a). Because the word "filed" had never been defined Congress, the United States Supreme Court had used the physical delivery rule as set forth in *Lombardo* which stated that the filing of a document is not complete until it has been delivered and received. *Carroll v. Commissioner*, 71 F.3d 1228, 1230 (6th Cir, 1995). To mitigate disparities caused by differences in mail delivery from one part of the country to another the Congress, in 1954, enacted 26 U.S.C. §7502, explicitly providing two statutory exceptions to

the physical delivery rule with respect to the filing of income tax returns and claims. *Id.* Under §7502(a), by producing the postmark, a taxpayer may rely upon the statutory presumption of receipt of the document or payment on the date of the postmark even though the item was received by the IRS after the deadline. 26 U.S.C. §7502(a). Under §7502(c), a taxpayer may prove timely mailing by producing the date shown on the postal receipt given for documents sent to the IRS by registered or certified mail. 26 U.S.C. §7502(c). The receipt is prima facie evidence of delivery; however, the presumption of receipt under either of these statutory mailbox rule provisions is rebuttable by the IRS. *Carroll*, 71 F.3d at 1231. As with these analogous federal statutes, R.C. 5705.37 permits the use of the postmark to establish a constructive date of filing, but presupposed is the actual of delivery and receipt of a mailing by the intended recipient. If Appellee Budget Commission never took delivery of the October 15, 2004 mailing, which was clearly established in the record below, then the date of the postmark is irrelevant as the presumption of delivery is rebutted.

Another argument Appellant offers to support that it complied with R.C. 5705.37 is that it “properly addressed” its October 15, 2004 mailing. In doing so, Appellant cites *Mercantile Stores v. Tracy* (Mar. 27, 1998), BTA No. 1997-A-256, unreported, affirmed (Nov. 2, 1998), Butler App. No. CA98-04-85, unreported. According to Appellant, a “properly addressed” mailing eliminates the requirements of delivery to and receipt by the addressee to constitute a “filing”. To hold so would fundamentally change the definition of a “filing” as set forth in *Fulton and Lombardo*. Further, Appellant asked us to accept that the envelope, which cannot be located, was properly addressed to begin with. Appellee Budget Commission is not prepared to do so. The envelope in *Mercantile Stores* was addressed to the “Roger Tracy, Tax Commissioner of Ohio, State Office Tower, 24th Floor,”. The tax commissioner’s offices

were actually located on the 22nd floor of the State Office Tower. This small error was sufficient for the *Mercantile Stores* Court to hold that the envelope was not properly addressed and dismissed the appeal. Unlike *Mercantile Stores*, the envelope for Appellant's October 15, 2004 mailing cannot be found. Without it, the exact manner in which it was addressed cannot be answered. Even if we were to assume that the Certified Mail Receipt [Supplement p. 3] was an accurate reflection of the address typed on the October 15, 2004 mailing, it still would not be considered properly addressed.

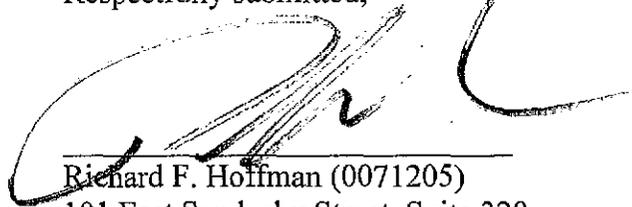
The budget commission is created by statute and names certain elected county officials as members. R.C. 5705.27. The statute provides that the prosecutor, treasurer, and auditor are members with the auditor serving as secretary. *Id.* Many other boards and commissions at the county level are similarly formed naming county elected officials as members and a secretary statutorily appointed. Examples include the Board of Revision, R.C. 5715.09, Automatic Data Processing Board, R.C. 307.84, and the Microfilming Board, R.C. 307.80. While these boards fulfill their required duties, they rarely maintain separate administrative offices. Walk into any courthouse in Ohio and ask for the "Microfilming Board Office" and you'll get blank stares looking back at you. The Revised Code has provided each of these boards with a secretary. Those secretaries have specific duties they are charged with by the Revised Code. The auditor, as secretary for the budget commission "shall keep a full and accurate record of all proceedings" and "appoint such messengers and clerks" as needed. R.C. 5705.27. As the auditor is responsible for the record of the budget commission, any would-be appellant can properly perfect an appeal by delivering upon the auditor its notice of appeal in a timely fashion. This Court in *Salem Medical Arts & Dev. Corp v. Columbiana Bd. of Revision* (1998), 80 Ohio St.3d 621, examined a similar situation with a county board of revision where the appellant "filed" its

notice of appeal with an assistant prosecutor rather than the board of revision. *Salem*, quoting *Phoenix Dye Works v. Cuyahoga Bd. of Revision* (Sept. 6, 1985), BTA No. 84-D-660, held that “[i]f there was no separately maintained office for the board of revision, then Salem could have filed its notice of appeal with the auditor. R.C. 5715.09 provides that the auditor is the secretary of the board of revision...”. *Salem*, 80 Ohio St.3d at 624. As Appellee Budget Commission did not maintain separate administrative offices within the Preble County Courthouse, Appellant should have applied *Salem* and addressed its October 15, 2004 mailing to the Preble County Auditor, as secretary to Appellee Budget Commission. Appellant was well aware of the Auditor’s address. See Appellant’s Merit Brief, footnote 3. Before Appellant may enjoy the benefits of the presumption of regularity of the delivery of the mails, it must properly address its Notice of Appeal. Appellant presumes too much if it believes that the Postal Service should also act as investigator to track down an administrative office that does not exist or to act as attorney to interpret statutes to determine into whose hands an errant Notice of Appeal should be delivered. The Postal Service’s charge is simply to deliver correctly addressed mail, not to be the perfecter of appeals for would-be appellants. Appellant, by failing to properly address its October 15, 2004 mailing, multiplied the risk of misdelivery of its Notice of Appeal.

Conclusion

Based upon the foregoing, Appellant failed to strictly comply with R.C. 5705.37 as no “filing” took place. Without a “filing”, subject matter jurisdiction fails to vest with the BTA and the decision below must be maintained.

Respectfully submitted,

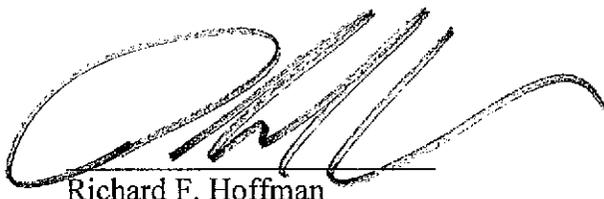
A handwritten signature in black ink, appearing to read 'R. Hoffman', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing MERIT BRIEF was served by regular U.S. Mail, postage prepaid, on this the 29th day of October, 2007, upon the persons listed below:



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