

OHIO BOARD OF TAX APPEALS

CINCINNATI FEDERAL SAVINGS & LOAN, (et. al.),)

Appellant(s),)

vs.)

JEFFREY A. MCCLAIN, TAX COMMISSIONER OF OHIO, (et.)

al.),)

Appellee(s).)

CASE NO(S). 2018-2247

(SALES AND USE)

DECISION AND ORDER

APPEARANCES:

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Entered Tuesday, December 22, 2020

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

Cincinnati Federal Savings & Loan Company (“Cincinnati Federal”) appeals from a final determination of the Commissioner denying refund claim 416180006480 in the amount of \$57,412.58. We decide the case on the notice of appeal, the statutory transcript (“S.T.”), the record of this board’s hearing (“H.R.”), and the briefs. For the following reasons, we affirm.

Cincinnati Federal operates several banks in the Greater Cincinnati area. Several years ago, it began using Fiserv banking software for its online banking system. See H.R. at 61-101 (testimony of Vice President Maria Ventre outlining the transition to Fiserv). Fiserv is a premier

provider of banking and software services to financial institutions. Fiserv provides many front-end and back-end services. See Cincinnati Federal Br. at 2; H.R., Ex. 9, 17, 21. Cincinnati Federal paid tax on many of the services. See Cincinnati Federal Br. at 9-10 (discussing invoices and exhibits showing sales tax was paid). After it paid sales tax, it filed a refund claim with the Tax Commissioner citing two relevant theories. See S.T. at 1-4. We note Cincinnati Federal also pursued a tangential theory that it was not the end-user. However, it appears to have abandoned that theory. See Cincinnati Federal Br. at 1-2.

Under the first theory, Fiserv's services should have been exempt as personal and professional services "[d]esigning policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management[.]" See R.C. 5739.01(Y)(2)(e). Under the second theory, the services should have been exempt accounting services under R.C. 5739.01(Y)(2)(a). The Commissioner rejected both arguments. For the custom software argument, he held as follows:

The banking software and services at issue in the present refund claim are not personal and professional services exempt from taxation as custom software. At hearing, and in its written documentation, the claimant constantly refers to the banking software and services at issue as "custom software." When asked for detail as to what makes the software at issue "custom," the claimant explained that it worked with its vendor to choose a mix of software options and features in order to facilitate online banking and related features, such as electronic bill payment and mobile banking via smart phone/mobile device, for its customers' use. Describing this type of arrangement and the software and services mix chosen as "custom" is a

misstatement for purposes of exemption from taxation as personal and professional service. Although the mixture of software chosen by the claimant and then set up and initiated by the claimant's vendor is custom in so far as the software offerings from the vendor can be mixed and matched to meet consumers' needs, the software was not specially made for the claimant (i.e., newly designed and developed for the sole and specific use of the claimant). On the contrary, the banking software offered to the claimant (and other consumers) already exists and is able to be set up and initiated by the vendor upon purchase by the consumer. Any bank or financial institution is able to engage the same vendor's services and participate in the same mixing and matching process in order to achieve its specific banking software and services needs (whether those needs be obtaining software and services that allow it to offer online banking, creating an internal network for viewing, analyzing, and updating customer financial records, or others). This type of software and vendor-consumer arrangement is *not* custom for the purposes of the definition of custom software considered a personal and professional service in accordance with R.C. 5739.01 (Y)(2)(e).

The Commissioner likewise rejected the accounting services argument. He held as follows:

Furthermore, the banking software and services at issue in the present refund claim are not personal and professional services exempt from taxation as accounting services. The claimant's vendor does not, nor do the banking software and services at issue, provide advice on tax matters, asset management, budgetary matters, or any other type of studying, altering, analyzing, interpreting, or adjusting of

the claimant's data or financial material. Rather, the claimant's vendor simply provides banking software and services that facilitate the claimant's ability to offer online banking and related features to its customers. At hearing, and in its written documentation, the claimant repeatedly states that the software and services the vendor provides are accounting services because the software "creates the general ledger." This too is a misstatement. The software only "creates the general ledger" to the extent that it displays and updates the information of the general ledger upon input of new data into the system by, or upon data request of, the claimant and/or the claimant's customers. This updating and displaying of information upon input or request of the data respectively is not accounting services; no studying, altering, analyzing, interpreting, or adjusting of the claimant's data or financial material occurs. Because no accounting services are received by the claimant from its vendor, the claimant does not receive personal and professional services in accordance with the definition found in R.C. 5739.01 (Y)(2)(a), and therefore cannot show that the "true object" of its engagement with its vendor is for personal and professional services to which the automatic data processing and electronic information services of the banking software and services at issue are incidental or supplemental as it states it "clearly" shows by the mere fact of simply stating it has done so.

Cincinnati Federal appealed to this Board, and this Board held a hearing. There, Cincinnati Federal opened its case with the testimony of Richard Cunningham. See H.R., Ex. 1 (Cunningham CV). Mr. Cunningham is a consultant to Cincinnati Federal's accounting firm. He also prepared the refund claim, and he testified to his belief that the transactions should be

exempt. We note at this time that the Commissioner lobbied an objection to the scope of Mr. Cunningham's testimony arguing a portion of his testimony constituted a legal opinion. We assign appropriate weight to Mr. Cunningham's testimony but give no weight to any pure legal conclusions he made.

Cincinnati Federal then called Vice President Maria Ventre. She testified that she oversees much of the Fiserv system. She described the system and how Cincinnati Federal uses the system.

Next, Cincinnati Federal called Scott Deters, a manager with the accounting firm that filed the refund claims. The same firm is affiliated with Mr. Cunningham. He testified primarily to his belief Fiserv provided accounting services including general ledger services.

Finally, Cincinnati Federal called Cincinnati Federal President Joe Bunke. He testified to his belief that Fiserv provided accounting services to Cincinnati Federal. See H.R. at 125-127 (describing the system generally).

Since Cincinnati Federal presented new evidence to this Board, we review the Commissioner's decision de novo. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798); *Antonine Maronite Sisters of Youngstown, Inc. v. McClain* (Jan. 7, 2020), BTA No. 2018-25, unreported. The appealing taxpayer bears the burden and must present credible evidence that the Tax Commissioner erred in his final determination. *Kern v. Tracy*, 72 Ohio St.3d 347 (1995). Exclusions are "strictly construed." *Satullo v. Wilkins*, 111 Ohio St.3d 399 (2006). The taxpayer "must affirmatively establish his or her right" to the exemption. *Campus Bus Serv. v. Zaino*, 98 Ohio St.3d 463, 2003-Ohio-1915.

R.C. 5739.01(B) reads as follows:

(B) "Sale" and "selling" include all of the following transactions for a

consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

(1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted;

(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests;

(3) All transactions by which:

(e) Automatic data processing, computer services, or electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental.

***.

In sum, automatic data processing, computer services, and electronic information services are subject to sales and use tax when the true object of the transaction is automatic data processing, computer services, and electronic information services. See R.C. 5739.01(B)(3)(e); see also *Glassman, Inv. v. Levin*, 119 Ohio St.3d 254, 2008-Ohio-3819. “Personal or

professional services” are excluded. That phrase is defined in R.C. 5739.01(Y)(2). The exclusions Cincinnati Federal relies on are found there.

We now turn to our analysis. We find the Fiserv software is not custom as that term is used in R.C. 5739.01. In its argument, Cincinnati Federal focuses on how Fiserv software creates data unique to Cincinnati Federal. However, as the Commissioner notes in his brief, the relevant question is not whether the data is custom but whether the *software* is custom. Compare TC Brief at 13 with Cincinnati Federal Br. at 17-18. Neither party cites a case from this Board or any court holding the services provided in this case are custom. R.C. 5739.01 does not define “custom software,” and no party cites a definition from any other statute. The dearth of precedent on point persuades us to find these services are not exempt because the burden is on the taxpayer to prove the General Assembly has expressly provided such an exemption, and Ohio Supreme Court has been clear “in all doubtful cases the exemption is denied.” See *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904.

The record in this case indicates software customization is a spectrum. On one end, vendors sell prewritten software with no modifications specific to the purchaser. Such software is taxable under R.C. 5739.01(DDD). On the other end, a vendor creates an entirely new software system from scratch, which would likely be exempt. The services Fiserv provides are in the middle. While Cincinnati Federal focuses on the system specific to it, the record is clear Fiserv is a major player in banking software and services with a significant number of clients who use Fiserv’s software. Fiserv did not start from scratch. But we also recognize Fiserv made some modifications to account for Cincinnati Federal’s needs. We need not draw the line on that spectrum in this case because that is the responsibility of the General Assembly. Because the exemption is “doubtful” we reject the argument.

We now turn to the accounting services argument. Luckily, there is slightly more law on point. However, again, R.C. 5739.01 does not define accounting services. The term is used twice but not defined. See generally *State ex rel. Jones v. Conrad*, 92 Ohio St. 3d 389, 392, 2001-Ohio-207, 750 N.E.2d 583 (2001). Cincinnati Federal deems *Genuine Parts Company v. Limbach*, 62 Ohio St.3d 93 (1991) as the “controlling case.” We find the case unhelpful though because the services Fiserv provides are quite different, as the Commissioner’s brief notes. In that case, a vendor prepared financial statements and tax returns, reconciled bank statements, printed checks to pay for invoices and employees, and rendered financial advice. Here, we see no testimony or evidence that Fiserv files Cincinnati Federal’s returns, prints its checks, or renders financial advice. See, e.g., H.R. at 118 (indicating Cincinnati Federal, at a minimum, files its own “call report” with the federal government).

We find the Commissioner was correct in his final determination. The testimony in this case confirms his holding below, as follows:

The claimant’s vendor does not, nor do the banking software and services at issue, provide advice on tax matters, asset management, budgetary matters, or any other type of studying, altering, analyzing, interpreting, or adjusting of the claimant’s data or financial material. Rather, the claimant’s vendor simply provides banking software and services that facilitate the claimant’s ability to offer online banking and related features to its customers. At hearing, and in its written documentation, the claimant repeatedly states that the software and services the vendor provides are accounting services because the software “creates the general ledger” This too is a misstatement. The software only “creates the general ledger” to the extent that it displays and updates the information of the general ledger upon input of new data

into the system by, or upon data request of, the claimant and/or the claimant's customers. This updating and displaying of information upon input or request of the data respectively is not accounting services; no studying, altering, analyzing, interpreting, or adjusting of the claimant's data or financial material occurs.***.

We agree. To be sure, Fiserv's software provides detailed information to Cincinnati Federal, but we have no evidence that such services rise to the level of "accounting services" under any definition cited by any party. We further make one additional observation. The record does not credibly show even Fiserv markets itself as an accounting firm operating in Ohio. Indeed, such firms potentially subject to Ohio law and the Ohio Accountancy Board. We have no evidence Fiserv is so licensed. Obviously, Fiserv did not consider its services to be accounting services, hence why it collected sales tax in the first instance. Accordingly, we reject the accounting argument.

For these reasons, we find Cincinnati Federal has not carried its burden, and we affirm.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary