

OHIO BOARD OF TAX APPEALS

FORD & ASSOCIATES)	
ARCHITECTS, INC., (et. al.),)	
Appellant(s),)	CASE NO(S). 2020-2429
vs.)	
)	(COMMERCIAL ACTIVITY TAX)
PATRICIA HARRIS, TAX)	
COMMISSIONER OF OHIO, (et.)	DECISION AND ORDER
al.),)	
Appellee(s).)	

APPEARANCES:

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Entered Monday, February 27, 2023

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

Ford & Associates Architects, Inc. (“Ford”) appeals from a final determination of the Tax Commissioner affirming a commercial activity tax (“CAT”) assessment. The Department of Taxation determined that Ford underreported its CAT liability. Thereafter, the Commissioner affirmed that decision finding that Ford failed to provide any business records affirmatively establishing that the benefit of Ford’s services were received outside Ohio. Ford asks us to

overturn that decision and argues that we should conclude that the Commissioner erred in determining the taxable gross receipts from Ford's services were not subject to the CAT because the benefits received from those services were located outside Ohio. We disagree. For the reasons that follow, we affirm the Commissioner's decision.

BACKGROUND

Audit and Assessment

Ford is a full-service architectural and planning firm located in Columbus, Ohio, with services ranging from architectural design to interior planning. The Department reviewed Ford's "filings and identified that [Ford] had underreported taxable gross receipts from sales situsable to Ohio" from April 1, 2013–December 31, 2016. According to the Audit Remarks, the Department reached out to Ford in February and March 2017, however, the appellant was unresponsive. So, the Department calculated Ford's taxable gross receipts for the period at issue based on the best evidence available. Based on those calculations, the Department assessed Ford \$54,520 including taxes, penalties, and interest.

Lastly, the Department examined Ford's annual minimum tax ("AMT") payments since those are required by taxpayers registered in the CAT. Based on the evidence available, the Department determined that Ford under-remitted its AMT by \$3,600 for the period at issue.

Petition for Reassessment

Ford filed a petition for reassessment, opting to forego a hearing on the matter. Ford argued that the gross receipts for its services were not subject to CAT because the benefit of those services were received outside Ohio. Further, Ford asserted that it had filed all its quarterly CAT returns timely and accurately. In support of its position, Ford submitted summary spreadsheets claiming to depict totals for all of its out-of-state sales during the period at issue.

The Commissioner requested documentation to support Ford's contentions and to corroborate the information on the summary spreadsheets. Ford responded by providing Federal

Form 1120s. Thereafter, the Commissioner made one final request for the taxpayer to provide invoices, work orders, contracts, or other business records then in existence to support Ford's arguments. Ford failed to provide any of those records. Consequently, the Commissioner determined that Ford failed to demonstrate that its taxable gross receipts were generated in association with services to out-of-state purchasers. Ultimately, the Commissioner upheld the assessment finding that there was no evidence in Ford's records to distinguish between in-state and out-of-state purchasers or to support Ford's methodology. From this decision, Ford filed the present appeal.

STANDARD OF REVIEW

In an appeal of the Commissioner's final determination, the Ohio Supreme Court has held that the Commissioner's factual findings are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 537 N.E.2d 1302 (1989). A taxpayer challenging such findings must rebut the presumption by establishing a clear right to the requested relief. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 311 N.E.2d 1 (1974). A taxpayer must present credible evidence establishing in what manner and to what extent the Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983). When no competent and probative evidence is presented by the appellant to show that the Commissioner's findings are incorrect, this Board must affirm the Commissioner's findings. *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 488 N.E.2d 145 (1986).

When no hearing is requested, such as in this case, our review is confined to the evidence in the statutory transcript. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 665 N.E.2d 1098 (1996). Further, an appellant cannot rely on attachments to its notice of appeal as evidence. Here, Ford attached 151 pages of additional documentation to its notice of appeal that were not presented to the Commissioner below. We have ruled repeatedly that "an appellant's statements in, and attachments to, the notice of appeal do not rise to the level of

evidence upon which [this Board] can rely in making [its] determination herein, as they constitute mere contentions, submitted outside this Board’s hearing process.” *Trustee for the American Legion v. McClain*, BTA Case No. 2020-2420, 2022 Ohio Tax LEXIS 1409 (May 5, 2022). Consequently, we will not consider those documents in our decision. *Pi in the Sky, L.L.C. v. Testa*, 155 Ohio St.3d 113, 2018-Ohio-4812, 119 N.E.3d 417; *see also* Ohio Adm.Code 5717-1-16 (this Board’s rule stating new evidence must be submitted at a hearing). Accordingly, we consider the matter upon the notice of appeal, the statutory transcript certified by the Commissioner pursuant to R.C. 5717.02, and the Commissioner’s written argument.

ANALYSIS

Commercial Activity Tax (CAT)

The General Assembly enacted the CAT in 2005. Am.Sub.H.B. No. 66, 151 Ohio Laws, Part II, 2868. “The idea was to make Ohio a more attractive place to do business by replacing the existing business-tax regime.” *NASCAR Holdings, Inc. v. McClain*, 2022-Ohio-4131, ¶ 4. The Court explained that:

The CAT is imposed on “taxable gross receipts for the privilege of doing business in this state.” R.C. 5751.02(A). “Gross receipts” are “the total amount realized, * * * without deduction for cost of goods sold or expenses incurred, that contributes to the production of gross income.” R.C. 5751.01(F). In other words, instead of being imposed on a net income, the CAT is applied to all funds received from business transactions. *See* R.C. 5751.03.

The CAT law defines as “taxable gross receipts” only those receipts that are “gross receipts *sitused* to this state.” (Emphasis supplied.) R.C. 5751.01(G). The amount of “gross receipts sitused to this state” is important for two reasons. First, gross receipts are used to determine whether a business is subject to the CAT; those subject to the CAT include businesses with a “substantial nexus” to Ohio. R.C.

5751.02. Among the ways a business can have a substantial nexus to Ohio is to have \$500,000 of annual taxable gross receipts. R.C. 5751.01(H)(3) and (I)(3); *see Crutchfield Corp. v. Testa*, 151 Ohio St. 3d 278, 2016-Ohio-7760, 88 N.E.3d 900, ¶¶ 5, 21. Second, gross receipts are used to determine how much tax is owed; liability is calculated by applying the base tax rate to “taxable gross receipts.” R.C. 5751.02. *Id.* at ¶¶ 5-6.

The dispute before us concerns whether certain receipts were properly situated to Ohio. Receipts are situated to Ohio according to taxable categories. *See* R.C. 5751.033. Relevant here, the situsing law provides that gross receipts from “the sale of all other services, and all other gross receipts not otherwise situated under this section, shall be situated to [Ohio] in the proportion that the purchaser’s benefit in [Ohio] with respect to what was purchased bears to the purchaser’s benefit everywhere with respect to what was purchased.” R.C. 5751.033(I).

In addition, the Ohio Administrative Code provides guidance on how to source various services and what situsing method should be used for CAT purposes. Ohio Adm.Code 5703-29-17(C)(6), entitled architecture services (including drafting services), states in pertinent part:

(a) If architectural services are performed for a purchaser and the property being designed is to be located wholly in Ohio, one hundred per cent of the gross receipts are situated to Ohio regardless of where the services are performed.

For example, architectural services are performed for a property to be built in Youngstown, Ohio; one hundred per cent of the gross receipts for that service are situated to Ohio.

(b) If architectural services are performed for property that will be located within and without Ohio, the gross receipts are situated using any reasonable, consistent, and uniform method of apportionment that is supported by the service provider’s

business records as they existed at the time the service was provided. As a default, the number of properties anticipated to be built in Ohio compared to everywhere will be accepted. If the services are not for standardized buildings, square footage may be used as a method of apportionment unless it creates a distortion.

For example, architectural services are performed for ten properties, three of which are in Ohio and seven of which are at non-Ohio locations. The architect's fee is thirty per cent sitused to Ohio.

With respect to the situsing of receipts from services for CAT, the importance of submitting supporting documentation is identified clearly in both the relevant statute (R.C. 5751.033(I)) and the relevant administrative rule (Ohio Adm.Code 5703-29-17(A)). Both provisions recognize that a taxpayer's method for situsing services must be supported by the taxpayer's business records as they existed at the time of the performance of the service.

Upon review, we find Ford's summary spreadsheets are ambiguous and require further clarity or explanation. As noted above, Ford bears the obligation to explain precisely how the Commissioner committed an error with probative and credible evidence. Ford has not done so in this case. Instead, Ford has left us with more questions than answers – such as who made the documents, how they were compiled, were the documents amended or audited, and whether the documents were standard business records or created solely for purposes of litigation. Delving into the granular level we have even more questions – such as for whom and for what purpose were the architectural services performed, what was designed, and where the buildings (if any) were located.

But Ford made no effort to describe with specificity what portions of the record support its contentions, and it is not the duty of this Board to comb through Ford's documents to determine if they support its views. *Westlake Polymers v. McClain*, BTA No. 2019-830, 2020 Ohio Tax LEXIS 965 (Mar 29, 2020); *accord Shree Ganesh Wash, Inc. v. Licking Cty. Bd. of Revision*, BTA No.

2020-1167, 2022 Ohio Tax LEXIS 434 (Feb. 11, 2022). Further, Ford failed to file a brief outlining its position. It is not this Board's responsibility to advocate for the parties when they fail to advocate for themselves. *See Sunflower Chinese Rest. v. McClain*, BTA No. 2020-2086, 2022 Ohio Tax LEXIS 3050 (Dec. 28, 2022).

Therefore, we find that Ford failed to provide probative and credible evidence that the Commissioner erred in her determination regarding its CAT liability.



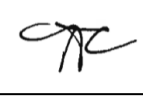
Annual Minimum Tax (AMT)

In addition to the CAT, the Commissioner determined that Ford was required to remit AMT for the periods at issue. R.C. 5751.03(B) requires taxpayers registered for the CAT to remit an AMT. The Department identified that Ford failed to remit the entirety of its AMT for 2014-2016. The Commissioner concluded that after applying several partial AMT payments that Ford under-remitted its AMT by \$3,600.

Ford provided no arguments and no evidence regarding this portion of the Commissioner's determination. Likewise, upon review of the record, we find that Ford failed to provide probative and credible evidence that the Commissioner erred in her decision regarding AMT.

CONCLUSION

For the foregoing reasons, this Board finds that the appellant has failed to overcome the presumption in favor of the Commissioner's determination. Accordingly, the Commissioner's decision must be and, hereby is, affirmed.

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