OHIO BOARD OF TAX APPEALS

DAVID KIM, (et. al.), Appellant(s), vs. PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, (et. al.), Appellee(s).	)	CASE NO(S). 2020-1124 (SALES AND USE) DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - DAVID KIM
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Entered Tuesday, July 25, 2023

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

Appellant taxpayer, David Kim, appeals a final determination of the Tax Commissioner, in which she affirmed three use tax assessments issued against appellant related to the purchase and use of three automobiles. Appellant did not pay any tax for the cars and claimed that the sales were not subject to sales and use tax because the cars were purchased for purposes of resale. This matter is now considered upon the notice of appeal, the statutory transcript ("S.T."), the record of this Board's hearing ("H.R."), and any written arguments. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

The assessments at issue concern the appellant's use of vehicles within Ohio. Mr. Kim was a part owner of Switzer Performance, a company based in Oberlin, Ohio, which enhanced high-performance cars and made them faster. Mr. Kim started a new side business that would

purchase, modify, and resell automobiles. Mr. Kim's goal was to have the cars modified and ready to sell when a potential customer contacted him. He formed Kim Consulting, LLC, in Montana, for this purpose. Mr. Kim testified at the hearing before this Board that he decided to form the LLC in Montana because there was no sales tax in Montana and to avoid the need to obtain a dealer's license in Ohio. H.R. at 30-32. Mr. Kim did not obtain an Ohio motor vehicle dealer's license. He has never articulated another reason why he founded the LLC in Montana. Mr. Kim obtained an investor, Lester Haverty, to contribute to his business plan, and they began buying cars and titling them in Montana. For example, Kim Consulting purchased a white 2013 BMW M5 ("BMW"), a black 2013 Nissan GTR-Coupe ("2013 Nissan"), and a black 2014 Nissan GTR Coupe ("2014 Nissan") and had them titled in Montana. Mr. Kim testified that Kim Consulting even purchased the BMW in Ohio. H.R. at 40. Regardless, on August 31, 2012, Mr. Kim signed an affidavit at the time of the sale that certified the BMW would be immediately removed from Ohio and would not be used in the state of Ohio. S.T. at 14. Mr. Kim later acknowledged that was untrue because the cars were sent to Switzer Performance in Oberlin, Ohio, to be improved after they were purchased. H.R. 42-43.

PROCEDURAL HISTORY

In the Commissioner's final determination, she concluded that the cars were stored and used in Ohio and that Kim Consulting LLC was a sham creation designed to avoid tax in Ohio. She opined that the creation of the company had no economic substance because there was no business purpose other than obtaining tax benefits. Therefore, she classified it as a sham transaction and disregarded it for purposes of determining tax liability. The Commissioner assessed a total use tax assessment of $45,947.20 against Mr. Kim for the use of the three vehicles. She noted that by keeping the vehicles into Ohio to be stored and modified, the appellant exercised ownership and control over the vehicles, subjecting them to use tax in Ohio. The Commissioner relied heavily on our opinion in *Dotzauer v. Testa*. BTA Nos. 2014-2030,

2014-2076, 2015 WL 1048568 (Feb. 27, 2015). She asserted that the resale exception to sales and use tax levied on a motor vehicle is not available to a taxpayer who does not possess a motor vehicle dealer's license. The Commissioner affirmed the assessments.

From this final determination, the appellant filed the present appeal. This Board convened a hearing at which Mr. Kim testified regarding his motivations and business activities. Lester Haverty, who provided funding to Kim Consulting, also testified as a witness for Mr. Kim. The Commissioner relied on testimony from Michael Kamm, the Tax Examiner Manager who performed the audit on the vehicles at issue. The Commissioner also relied on the testimony of Sarah Stedtefeld, Chief of Dealer Licensing with the Bureau of Motor Vehicles, who testified how to read various motor vehicle documents. The parties submitted briefs after the hearing.

ANALYSIS

Standard of Review

The findings of the Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 537 N.E.2d 1302 (1989). Consequently, it is incumbent upon a taxpayer challenging a determination of the Commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens Inc. v. Kosydar*, 38 Ohio St.2d 135 311 N.E.2d 1 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138, 235 N.E.2d 511 (1968). In this regard, the taxpayer is assigned the burden of showing 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).

The appellant is required to pay use tax

Generally, excise taxes are imposed upon all retail sales made in Ohio (sales tax), in addition to any storage, use, or consumption in this state of any tangible personal property (use tax). R.C. 5739.02 and 5741.02. The Ohio revised code provides for numerous exceptions and exemptions to the collection of sales or use tax, including sales "in which the purpose of the

consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." R.C. 5739.01(E).

Mr. Kim did not pay sales tax on the cars when he purchased them. After buying the cars, he had them enhanced at a shop in Oberlin, Ohio. There was also substantial testing done. As Mr. Kim testified at the hearing before this Board, "[s]o there is quite a bit of testing that goes on, as you can probably imagine, if you're taking a car and actually doubling the output of the power." H.R. at 18. There is no indication that the cars ever left the state of Ohio during this time. The vehicles were therefore stored and used in Ohio. The appellant claims that the Commissioner erred in assessing the sales at issue because they were purchases for resale and, therefore, should be exempted from use tax. On the other hand, the Commissioner maintains that because the appellant did not operate as an enterprise "engaged in the business" of selling motor vehicles and did not resell the vehicles in the same form in which they were purchased, the resale exemption does not apply. We must consider whether there is an exemption, exclusion, or exception to the requirement to pay use tax. "Statutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto." *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus; s*ee also Ball Corp. v. Limbach*, 62 Ohio St.3d 474, 584 N.E.2d 679 (1992).

Mr. Kim's cars do not qualify for the resale exception because the automobiles were fundamentally and substantially altered.

Appellant claims that use tax does not apply to the automobiles at issue because they were purchased for resale. No party disputes that the cars were used and stored in Ohio. *See Gallensteun v. Testa*, 138 Ohio St.3d 240, 2014-Ohio-98, 6 N.E.3d 1. We find that the resale exception does not apply here for two reasons.

First, the resale exception does not apply because R.C. 5739.01(E) specifies that the thing

or benefit must be sold "in the form in which the same is, or is to be, received by the person." Here, the things sold, the automobiles, were not in the same form in which the appellant received them. Importantly, Mr. Kim has identified no other exception, exclusion, or exemption that would apply.

As explained in our decision in *DaimlerChrysler Corp. v. Wilkins*, when the "purchaser's intent in buying goods or services is to resell them to yet another purchaser *without changing the goods or services in any way*, the original purchase is not considered a 'retail sale' and is therefore not subject to the sales tax on retail sales." (Emphasis added.) BTA No. 2004-T-187; 2004-T-188, 2006 Ohio Tax LEXIS 956, at *17-18 (Aug. 18, 2006) quoting *Cousino Constr. Co. v. Wilkins*, 108 Ohio St. 3d 90, 2006 Ohio 162, 840 N.E.2d 1065. This Board previously held that a vehicle that had been restored after purchase was resold in a different form, and as a result, the purchase did not qualify for the exemption from taxation pursuant to R.C. 5739.01(E)(1). *See, e.g.*, *Goldberg v. Tracy*, BTA No. 91-J-1637, 1993 Ohio Tax LEXIS 1874, *12 (Nov. 12, 1993); *see also Peterbilt of Northwest Ohio v. Wilkins*, BTA No. 2004-A-1429, 2006 Ohio Tax LEXIS 313 (Feb. 10, 2006).

The automobiles were changed substantially by Mr. Kim before they were resold. At the hearing before this Board, Mr. Kim testified that the purpose of his business was to buy vehicles, pay for performance enhancements to be done, and then resell the cars to customers. H.R. at 13-14. The record reflects that the automobiles were improved by Switzer Performance so that they would drive faster. H.R. at 22. The transcript includes performance enhancement invoices from Switzer Performance for two of the vehicles at issue. (pg. 173-176, 227-233). The invoice for one of the vehicles listed the work that was done on the car and came to a total of $122,500. S.T. at 229. At the hearing before this Board, Mr. Kim explained that major components of the car were taken out, taken apart, and then completely changed. H.R. at 45-51. For example, he testified that the fuel injectors and cooling system were changed, the turbochargers were replaced with

bigger turbochargers, the size of the exhaust system was enhanced, and the transmission was upgraded. H.R. at 46-49. He explained, regarding the engine, "you actually take the engine out, pull it apart, like completely disassemble it, then change all the parts in the engine, like the connecting rods and the pistons, and these are all parts in the general that could again handle the substantial increase in power." H.R. at 49. Mr. Kim testified that all the springs and shocks were changed, bigger breaks were added, new wheels and tires were added, the axles were upgraded, and laser and radar detection systems installed. H.R. at 49-51. He testified that the wheels and tires changed the appearance of the car, and "[s]o from that standpoint you can see a little different in the outer appearance, but mostly all the changes were done internally to the engine, the transmission, the suspension, the brakes, things like that." H.R. at 19. The testimony clearly shows that the cars were enhanced so that they would drive faster. The work done on the vehicles was significant in terms of monetary cost and the magnitude of changes made to the cars. Fundamental changes were made to the cars to transform them into high-performance vehicles. The vehicles were sold in a different form from which they were purchased. Therefore, the purchase of the vehicles did not qualify for the exception from taxation pursuant to R.C. 5739.01(E)(1).

Mr. Kim cannot claim the resale exception since he lacked a dealer's license.

The second reason the resale exception does not apply is because *Dotzauer* controls this case. Under R.C. 5739.01(E), "'Retail sale' and 'sales at retail' include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." Mr. Kim argues that he is entitled to the resale exception. In similar facts, the taxpayers in *Dotzauer* claimed they were entitled to the resale exemption after selling automobiles. In that case, we held that the resale exception to sales and use tax levied on a motor

vehicle was not available to taxpayers who did not possess a motor vehicle dealer's license. It is undisputed that Mr. Kim did not have a motor vehicle dealer's license. Therefore, the resale exception is not available to Mr. Kim.

Mr. Kim does attempt to distinguish *Dotzauer*, but his attempts fail. He argues that *Dotzauer* is distinguishable from the present case because he was not required to have a dealer's license under R.C. 4517.02 because he purchased five or fewer motor vehicles within a twelve-month period. However, *Dotzauer* does not make a distinction regarding how many cars taxpayers must have sold to qualify for the exception, but states that since the taxpayers were not properly licensed to sell motor vehicles, they "cannot avail themselves of an exemption from the sales/use tax to be applied to such sales." Since Mr. Kim did not have a motor vehicle dealer's license, he cannot avail himself of the resale exception.

Mr. Kim and the Commissioner have asserted additional alternative arguments. However, since we have determined that the vehicles do not qualify for the resale exception because the automobiles were fundamentally altered and Mr. Kim did not have a dealer's license, we do not need to consider these additional arguments.

Penalty Abatement

We also deny the appellant's claim that we should abate the penalty. The Supreme Court has held that "[b]y stating that a penalty 'may be added,' [R.C. 5739.13(A)] confers discretionary authority on the tax commissioner to impose a penalty in conjunction with an assessment of unpaid sales tax." *Karr v. McClain*, Slip Opinion No. 2022-Ohio-449, ¶ 7, citing *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, 865 N.E.2d 866, ¶¶ 14-15 (collecting cases). "An abuse of discretion in the tax-penalty context is an act showing an 'arbitrary or unconscionable attitude' on the part of the tax commissioner. *Renacci v. Testa*, 148 Ohio St.3d

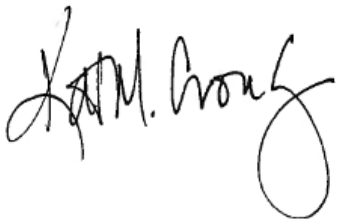
470, 2016-Ohio-3394, 71 N.E.3d 962, ¶ 32, citing *J.M. Smucker, L.L.C.*, at ¶ 16." *Karr* at ¶ 8. Upon review of the record, we conclude there is no evidence that the Commissioner abused her discretion regarding the amount of the penalty assessed.

CONCLUSION

Based upon the foregoing, we find that the Commissioner's determination was reasonable and lawful. Accordingly, the final determination must be, and hereby is, affirmed.

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

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