OHIO BOARD OF TAX APPEALS

LAWRENCE J. DULAY, (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2014-2074

(SALES TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - LAWRENCE J. DULAY
Represented by:
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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Entered Thursday, December 3, 2015

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

The Board of Tax Appeals considers this appeal pursuant to an amended notice of appeal filed by appellant Lawrence J. Dulay ("appellant") from a final determination of the Tax Commissioner in which the previously issued responsible party assessment against appellant was adjusted. Pursuant to R.C. 5739.33, the commissioner determined that appellant was a responsible party for the unpaid sales tax of Patio Enclosures, Inc. ("Patio"), for the period of January 1, 2003 through December 31, 2006. This matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing, and all written argument filed by the parties, including appellant's surreply brief, as appellant's motion for leave to file surreply instanter is hereby granted.

In reviewing appellant's appeal, we 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 the 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. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and

probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan*, supra.

The only issue the commissioner considered in rendering the underlying final determination herein was whether appellant was a responsible party for Patio during the assessed periods. The commissioner concluded that:

> "The petitioner does not challenge that he is the responsible party. Indeed, at the hearing on the matter, it was acknowledged that the petitioner is a responsible party as contemplated under R.C. 5739.33. However, the petitioner contends that the assessment erroneously includes tax for dates January 1, 2003 through June 25, 2003. The facts indicate that the petitioner was assessed as a responsible party under a direct pay permit. The objection is granted. The transactions prior to June 26, 2003 will be removed from the assessment." S.T. at 1 (footnote omitted).

Thereafter, on appeal to this board and upon the commissioner's motion, appellant's appeal was initially dismissed by this board because the notice "only raised issues that were not first raised before the commissioner." *Dulay v. Testa* (Jan. 29, 2015), BTA No. 2014-2074, unreported; however, upon reconsideration, the board vacated its earlier dismissal "for the sole purpose of conducting a hearing for the receipt of evidence and testimony relating to appellant's as applied constitutional challenges." *Dulay v. Testa* (Feb. 24, 2015), BTA No. 2014-2074, unreported. We reiterated the basis for our February 2015 order in a later order, stating:

> "At the outset herein it is important to note that, to the extent our order, issued February 27, 2015, was unclear, this board has limited its jurisdiction in this matter to only the determination of appellant's as applied constitutional challenges; as such, the parties should be mindful that this board will receive evidence and testimony only with relation to the following errors specified by the appellant: 'a) as applied to the Taxpayer, R.C. 5739.33 violates the Due Process Clause of the United States Constitution to the extent it supports the Taxpayer as being personally liable for taxes accruing under the Corporation's direct pay permit; b) as applied to the Taxpayer, R.C. 5739.33 violates the Due Process and Equal Protection Clauses of the United States Constitution to the extent it supports the Taxpayer as being personally liable for taxes accruing under the Corporation's direct pay permit since officers and employees of a corporation without a direct pay permit do not have personal liability for taxes due on a corporation's purchases.' Amended Notice of Appeal." *Dulay v. Testa* (Interim Order, Apr. 15, 2015), BTA No. 2014-2074, unreported.

Thus, the parties were put on notice that the only portion of the notice of appeal over which this board would exercise jurisdiction related to the due process and equal protection claims, as raised in the amended notice of appeal. We clearly stated in our earlier decision and hereby restate herein that the law is clear that an appellant's ability to raise an issue on appeal is limited by the issues raised in its petition for reassessment filed with the Tax Commissioner, or thereafter, in writing prior to the issuance of a final determination. *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.2d 28; R.C. 5733.11. See, also, *Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374,2010-Ohio-1468; *Buehler Food Markets, Inc. v. Tracy* (July 11, 1997), BTA No. 1996-T-643, unreported; *Indresco, Inc. v. Tracy* (Apr. 25, 1997), BTA No. 1996-T-981, unreported. The Supreme Court has held that the failure to raise an issue in a petition for reassessment precludes the BTA from taking jurisdiction over that issue - even if the issue was raised in the notice of appeal to the BTA. *CNG*, supra. See, also, *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189; *Awwad v. Levin* (Dec. 7, 2010), BTA Nos. 2009-K-953, 955, unreported. Thus, this board

concludes that appellant had an opportunity to present his claims regarding his responsible party status before the commissioner, but he did not do so. Therefore, all such claims will not be addressed by this board in the first instance, and, as such, we proceed to address appellant's constitutional claims only.

In *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197, the Supreme Court addressed this board's role in reviewing constitutional claims:

> "The BTA understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The BTA determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the BTA not only receives evidence in this type of case, but must weigh the evidence and determine the facts necessary for the court's review of the constitutional questions. Since the BTA did not make findings of fact, the commissioner asserts that we should remand the case for the BTA to comply.
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> "In *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, ***, paragraph three of the syllabus, we held:
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> '"The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* [1986], 24 Ohio St.3d 184, ***, construed.)'
>
> "We explained the process, 35 Ohio St.3d at 232,***:
>
> '"When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.
>
> '"To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder.'
>
> "Under *Cleveland Gear*, the BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the BTA receives evidence at its hearing, but we determine the facts necessary to resolve the constitutional question."

Appellant has asked this board to "make non-exclusive findings of fact based upon evidence and testimony presented at the hearing to assist the Supreme Court in its determination." Further, appellant requested that the board determine that twenty-six specific facts "were established at the hearing." Brief at 16. In consideration of the court's pronouncement in *MCI*, supra, we decline any such undertaking, as the court clearly stated that it will "determine the facts necessary to resolve the constitutional question[s]." *MCI*, supra at 198.

Appellant also seeks reconsideration of this board's hearing examiner's rulings relating to the receipt of certain exhibits into evidence. The board reconsiders the determination rendered at hearing regarding Exhibits 4 and 6, and hereby receives said documents into evidence, as they were previously filed with the board as attachments to a response/motion to remand filed by appellant in November 2014, and as such, the

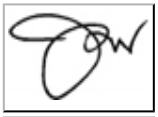
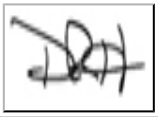
commissioner previously had the opportunity to review and comment on them. Further, because they were previously filed in conjunction with a motion, they are considered part of the instant record. In addition, the board reconsiders its rulings regarding Exhibits 3 and 15, concluding that good cause has been demonstrated by the appellant for receiving such documents into evidence, as they are related to the issues herein and were presumably in the possession of the commissioner, i.e., letter addressed to commissioner's counsel regarding Patio Enclosures assessment, dated February 12, 2010, and final determination regarding Patio Enclosures responsible party assessment against Kenneth B. Seckley, dated March 28, 2014.

Additionally, in relation to Exhibit 3, appellant also renewed a motion to compel previously denied at hearing, H.R. at 150-151; specifically, appellant's counsel moves the board "to compel the Tax Commissioner to produce all evidence concerning this refund claim. We believe it should have been produced as part of our discovery request but was not. And additionally, I was not aware of that refund claim until recently, so I also did not have notice of it." H.R. at 150-151. As the hearing examiner ruled at hearing, the time for seeking the board's involvement in a discovery-related matter has long passed. H.R. at 152. Pursuant to this board's rules, counsel was required, but failed, to raise this purported deficiency in the commissioner's discovery responses by the close of the discovery period, regardless of counsel's lack of awareness of certain issues during the discovery period. See Ohio Adm. Code 5717-1-06, 5717-1-11.

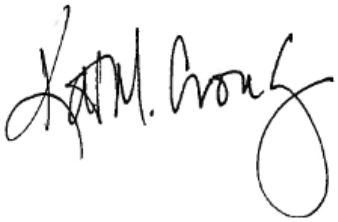
Appellant further requests that the board receive Exhibits 19-22 into evidence, which were not received by the hearing examiner at the time of hearing. Upon review, we note that the examiner clearly ruled that such documents were not disclosed by the appellant to the commissioner in a timely fashion, pursuant to Ohio Adm. Code 5717-1-06. H.R. at 300. As good cause was not demonstrated why the board's rules should be ignored, either at the board's hearing or through written argument in the post hearing briefs, such exhibits will not be received into evidence.

Finally, appellant contends that the "Board must overrule any hearsay objections regarding the Tax Commissioner's representatives and agents." Corrected Brief at 15. Without any specific reference to the record and the statements in question, this board cannot identify the statements to which appellant refers, and accordingly, such motion is denied. In the interest of clarity of the record, however, any objections by counsel at hearing, relating to testimony and/or statements made, that were "noted," but not directly overruled or sustained by the examiner at the time, are hereby overruled and received into the record.

Thus, in consideration of the record before us, including the adjustments to the record effected herein, it is the decision of the Board of Tax Appeals that the final determination of the Tax Commissioner from which appellant has appealed to this board must be affirmed.

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

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