

# OHIO BOARD OF TAX APPEALS

SEATON CORP., (et. al.),

CASE NO(S). 2015-224, 2015-743

Appellant(s),

( SALES AND USE )

vs.

DECISION AND ORDER

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

Appellee(s).

## APPEARANCES:

For the Appellant(s)

- SEATON CORP.  
Represented by:  
EDWARD J. BERNERT  
BAKER HOSTETLER  
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COLUMBUS, OH 43215

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO  
Represented by:  
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COLUMBUS, OH 43215

Entered Wednesday, July 13, 2016

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

These matters are considered by the Board of Tax Appeals upon two notices of appeal from two final determinations of the Tax Commissioner, filed herein by Seaton Corp. ("Seaton") and Kal Kan Foods Inc. ("Kal Kan"), respectively. In his determinations, the commissioner concluded that Seaton and Kal Kan entered into a contract for the provision of taxable employment services. Seaton was assessed sales tax for the period of January 1, 2010 through December 31, 2012 and Kal Kan was assessed use tax for the period of January 1, 2007 through June 30, 2010, based upon transactions related to their contractual relationship. We consider these appeals upon the notices of appeal, the statutory transcripts certified to this board by the Tax Commissioner ("S.T."), the evidence and testimony presented at a hearing before the board ("H.R."), and the written argument of the parties.

At the outset, we acknowledge 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. *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Kern*, supra; *Alcan*, supra.

Kal Kan operates a pet food manufacturing plant in Columbus, Ohio. Kal Kan contracted with Seaton to provide staffing services, to assist in the production operations. Specifically, Seaton provides workers for lower skilled positions, who primarily "handle manual tasks such as loading the tubs into the tub feeders and palletizing the product. \*\*\* No previous experience is required \*\*\*. \*\*\* The educational requirements are limited." Seaton/Kal Kan Brief at 4. Both Seaton and Kal Kan contest the portion of the subject assessments relating to the service provided by Seaton, which it claims does not constitute an "employment service," in the first instance, as defined in R.C. 5739.01(JJ), and, moreover, is excludable from tax, pursuant to R.C. 5739.01(JJ)(1) and/or (3).

Pursuant to R.C. 5739.02, "an excise tax is \*\*\* levied on each retail sale made in this state," with R.C. 5739.01(B)(3)(k) defining the term "sale" to include "[a]ll transactions by which \*\*\* [an e]mployment service is or is to be provided." R.C. 5741.02(A)(1) levies a complementary "excise tax \*\*\* on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided."

R.C. 5739.01(JJ) defines "employment service" as "providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so provided or supplied receive their wages, salary, or other compensation from the provider or supplier of the employment service or from a third party that provided or supplied the personnel to the provider or supplier." Pertinent to the arguments advanced by appellant, R.C. 5739.01(JJ)(1) states that "[e]mployment service does not include \*\*\* [a]cting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser." Further, R.C. 5739.01(JJ)(3) also states that "[e]mployment service does not include \*\*\* [s]upplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis."

Seaton contends that it does not provide an employment service, taxable under R.C. 5739.01(B)(3)(k) and defined in R.C. 5739.01(JJ), but, instead, operates an "on-site management operation, which \*\*\* hired, trained and managed" the workers in question. Seaton/Kal Kan Brief at 5. Seaton made "job assignments," monitored "the productivity of the work," and determined "whether \*\*\* [the workers] were operating safely" and communicated "any new procedures to \*\*\* [the workers]." Seaton/Kal Kan Brief at 5. "[W]e recruit the entry level, less skilled positions for the location, and we manage – we train those associates, and we manage those – manage those \*\*\* associates on a shift by shift and daily basis." H.R. at 69. Seaton maintains an attendance policy and monitors productivity issues, making sure the workers are working efficiently. H.R. at 70. Due to the level of control and direction Seaton maintains over the workers it provides, Seaton contends that its contractual relationship with Kal Kan does not meet the statutory provisions of R.C. 5739.01(JJ), which necessarily limits the supervision and control over such workers to Kal Kan.

The Supreme Court, in *Moore Personnel Services v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, ¶14, held:

"To satisfy the definition of 'employment service,' a service must meet three separate requirements: (1) it must provide or supply personnel on a temporary or long-term basis, (2) the personnel must perform work or labor under the supervision or control of another, and (3) the personnel must receive their wages, salary, or other compensation from the provider of the service." *Id.*

See, also, *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, 2005-Ohio-2167.

Seaton first argues that it does not satisfy the second requirement. We agree. Testimony before this board indicates that Kal Kan supervisors have no work-related interaction with Seaton workers on the job floor, unless a Seaton worker is committing a safety violation that could cause harm to the worker(s) or the manufacturing process/product; otherwise, Kal Kan supervisors report any problems with Seaton workers to Seaton supervisors, for further action. Likewise, any problems observed by Seaton workers must be reported to Seaton supervisors, who in turn, report the problems to Kal Kan supervisors. H.R. at 27-28, 72, 89. All training of Seaton's workers regarding general manufacturing processes, as well as safety issues, is done by Seaton, with the expectation that Seaton workers will have "the same knowledge" as Kal Kan employees do. H.R. at 33-34. Seaton gathers the scheduling requests from the workers and thereafter, creates the work schedules for its workers. H.R. at 88. Seaton is also responsible for payment of the workers. H.R. at 145.

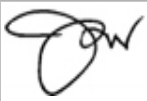


The commissioner argues that "Kal Kan controls the entire manufacturing process and all production lines. \*\*\* The entire production line and employment relationship put Kal Kan firmly in control of all employees engaged in the production line. \*\*\* It is Kal Kan that determines the need for such employees and how those persons will play a role in its production line." Comm. Brief at 3. The commissioner's agent testified that "Kal Kan \*\*\* directed and controlled the activity of the Seaton employees." H.R. at 145. The commissioner concluded that "[w]hen, as here, the leased labor is engaged to perform the day-to-day work of the employer – in this case, to fulfill low-skill positions on Kal Kan's production lines – then the employees are *necessarily* under the employer's direction and control." (Emphasis sic.) Comm. Brief at 3. We disagree that control over the manufacturing process and production lines somehow equates to control over the Seaton workers themselves. Kal Kan's contract with Seaton indicates Seaton's responsibilities with regard to its workers, which go beyond simply providing "supplemental staffing service workers," as argued by the commissioner; the contract specifically provides that Seaton will "furnish, manage and supervise" such workers. Seaton S.T. at 896. It provides that Seaton workers "are employees" of Seaton and that Seaton has "the exclusive right to control all" Seaton workers. It also requires that Seaton "maintain an attendance policy" for Seaton workers. Seaton S.T. at 898. Seaton was provided an on-site dedicated office space, and was required, at its own cost, to equip that space with office supplies necessary to provide its services. Seaton S.T. at 899. Seaton was required to "provide on-site supervision that is responsible for all shift management of the contractor employees," including, but not limited to worker orientation, worker performance management, worker coaching and counseling, interfacing with workers, processing timecards/payroll, and enforcement of workplace rules. Seaton S.T. at 910. With regard to pre-employment activities, Seaton was required to perform pre-screening, interviewing and testing of work candidates, as well as job orientation. Seaton S.T. at 911-913. Once hired by Seaton, workers were provided uniforms and safety equipment, at Seaton's expense. Seaton S.T. at 913.

Apparent from the record is Seaton and Kal Kan's intent to purposefully enter into a contract adopting an on-site management model. Seaton S.T. at 945-1020. The specific contract language supports the notion of separate employers, providing that neither Kal Kan nor Seaton could "assign, direct, or oversee" the activities of the other party's workforce. Seaton S.T. at 931. In describing its relationship with Seaton, Kal Kan stated that it "only communicates the production goals for a particular period and it is the responsibility of Seaton to perform and staff these needs appropriately." Seaton S.T. at 938.

The commissioner suggests that "the petitioner must demonstrate that the orders given to the Seaton site supervision/management personnel regarding manufacturing processes, procedures, and output did not originate from the petitioner [Kal Kan]," in order to establish that the Seaton workers are not under Kal Kan's control. Kal Kan S.T. at 2. The commissioner seems to indicate that Kal Kan must somehow expressly cede its authority over the entire production process to Seaton, in order for Seaton to successfully claim that it was not providing "employment services," even though the supervision and direction of the overall production process should properly be handled by the manufacturer, Kal Kan, including the production schedule and control of Kal Kan employees. Kal Kan, as the manufacturer in charge of its own operations, has the right to establish its own manufacturing processes and procedures, to which employees must adhere in the completion of their job tasks. Kal Kan, however, has given over a small portion of its

authority to Seaton, but only for the supervision and control of the Seaton workers. We find this to be a critical distinction between what is viewed as a "traditional" employment services agreement, that would have Seaton workers reporting to and being supervised by Kal Kan on a daily basis, and the on-site management model agreement that we have here, with Seaton workers reporting to and being supervised by Seaton, on Kal Kan's premises, in all instances.

Because we conclude that Seaton workers are not under the direct control of Kal Kan, the contract between Seaton and Kal Kan cannot be classified as an "employment services" agreement. Accordingly, we need not address any further arguments regarding whether other requisite elements of an employment services agreement have been established. Thus, based upon the totality of the evidence in the record before us, we conclude that Seaton did not provide an employment service to Kal Kan during the periods in question. The instant matters are hereby remanded to the commissioner for purposes of removing all transactions between Seaton and Kal Kan from the subject assessments, including all penalties and interest associated with such transactions.

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