

OHIO BOARD OF TAX APPEALS

GREAT LAKES BAR CONTROL, INC., (et. al.),

CASE NO(S). 2016-34

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) - GREAT LAKES BAR CONTROL, INC.
 Represented by:
 STEVEN A. DIMENGO
 BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC
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 AKRON, OH 44333

- For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
 Represented by:
 DANIEL G. KIM
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 OFFICE OF OHIO ATTORNEY GENERAL
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 COLUMBUS, OH 43215

Entered Friday, April 14, 2017

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

This matter is considered by the Board of Tax Appeals upon a notice of appeal from a final determination of the Tax Commissioner, filed herein by Great Lakes Bar Control, Inc. ("Great Lakes"). The commissioner concluded that Great Lakes was engaged in building maintenance and janitorial services, a taxable service pursuant to R.C. 5739.01(B)(3)(j), and was assessed delinquent sales tax for the period of July 1, 2004 through June 30, 2011. We consider this appeal upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner ("S.T."), the evidence and testimony presented at a hearing before this board ("H.R."), and the written argument submitted by the parties.

The findings of the Tax Commissioner are presumed valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). 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*, 38 Ohio St.2d 135 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138 (1968). 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*, 72 Ohio St.3d 347 (1995); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213 (1983). 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*, 53 Ohio St.3d 245 (1990); *Kern*, supra; *Alcan*, supra.

Great Lakes “is an Ohio corporation engaged in the business of providing particulate removal services *** to bars and other establishments serving draught beer. Over time, the lines through which beer is transported in a typical draught beer system develop a build up of bacteria, yeast, mold, beer stones and other undesirable and unhealthy particulates. The Company’s Services are designed to eradicate such build-up and to prevent the proliferation thereof. The Company performs the Services using various chemical agents, vacuum pumps and certain advanced sound emission technology.” S.T. at 14. Contrary to the commissioner’s conclusion that its business constitutes building maintenance and janitorial services, Great Lakes argues that its “services are all preventive or restorative in nature and are designed to keep or put the underlying property into ordinary operating condition, which can be contrasted with janitorial services, which are largely cosmetic in nature. Any cleaning that occurs in connection with these services is incidental to the primary preventative/restorative service.” (Emphasis omitted.) S.T. at 16.

Pursuant to R.C. 5739.01(B)(3)(j), “(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: *** (3) All transactions by which: *** (j) Building maintenance and janitorial service is or is to be provided[.]” Further, R.C. 5739.01(II) provides that “‘Building maintenance and janitorial service’ means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, ‘building maintenance and janitorial service’ does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.”

There is limited discussion in case law regarding the foregoing statutory provisions, and any building maintenance and janitorial services that have been discussed are arguably indisputably identifiable as taxable “cleaning” services, e.g., window cleaning, *Wonnacott v. Levin* (Aug. 4, 2009), BTA No. 2007-B-1375, unreported; maid/residential cleaning services, *Two Moms & A Mop, Inc. v. Wilkins* (Oct. 27, 2006), BTA No. 2005-T-1070, unreported; general building cleaning, see generally *Cousino Construction Company v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162. Therefore, with little precedent upon which we can rely, we look to other similar provisions in the law. We note that appellant advocates reliance upon Ohio Department of Taxation Information Releases for direction, which, although we agree are supportive of its position, “have no force of law.” *Renacci v. Testa*, Slip Opinion No. 2016-Ohio-3394, ¶37, ¶39.

Thus, although different statutory provisions were under review, we find the instant facts and underlying legal analysis analogous to our discussion in *Findlay Truck Line v. Tracy* (Nov. 24, 2000), BTA No. 1997-M-1167, unreported, wherein we held:

“The conflict between R.C. 5739.01(B)(3)(c) [“washing, cleaning, waxing, polishing, or painting a motor vehicle” is taxable] and R.C. 5739.02(B)(33) [charges associated with the “repair, and *maintenance of* *** motor vehicles that are primarily used for transporting tangible personal property by a person engaged in highway transportation for hire” are exempt from sales tax] has been addressed in prior decisions of this Board. In *Pressure Cleaning, Inc. v. Limbach* (May 10, 1991), B.T.A. No. 88-B-848, unreported, this Board concluded that the cleaning services of a tank truck cleaning facility qualified as maintenance services under R.C. 5739.01(B)(33). After a lengthy description of the services provided by the appellant and the methods by which the appellant cleaned the interior of tankers, the Board laid out definitions for the term ‘maintenance:’

““The dictionary definition of the term “maintenance” also falls into two basic categories. First, maintenance includes acts that will preserve a piece of equipment from failure or decline, or will prevent a decline in an existing state or condition. “Maintenance” also includes steps necessary to keep equipment in a state of operating efficiency or operating condition. The Oxford English Dictionary defines maintenance as “the action of keeping in effective condition, in working order, in repair.” Vol. IX. The Oxford English Dictionary 225 (2d ed.

1989). Webster's Third New International Dictionary likewise defines "maintenance" as the action of maintaining, which means "to keep in a state of repair, efficiency or validity; to preserve from failure or decline." Webster's Third New International Dictionary 1362 (1981). Black's Law Dictionary also defines "maintenance" as "expenditures undertaken to preserve an asset's service potential for its originally intended life." Black's Law Dictionary 860 (5th ed. 1979).'

"The Board then applied the definitions found to the facts of the matter before it and concluded, as to the specific facts presented, that the cleaning services qualified as 'maintenance' for purposes of R.C. 5739.01(B)(33).

"Not all appellants have been as successful in convincing the Board that the sale of cleaning services were not subject to tax. In *Total Wash, Inc. v. Limbach* (Jan. 22, 1993), B.T.A. No. 90-M-471, unreported, the appellant failed to present sufficient evidence to this Board concerning the necessity of the provided cleaning services to remove corrosive materials, extend truck life and/or prevent structural damage. Therefore, the Board found that the appellant failed to carry its burden of proof and found that the cleaning sales were subject to tax under R.C. 5739.01(B)(3)(c). See, also, *Total Systems Cleaning and Supply, Inc. v. Limbach* (Dec. 23, 1992), B.T.A. No. 90-P-1011, unreported, wherein this Board held:

"The record in this case is devoid of competent and probative evidence to establish Appellant's [cleaning] service was used to preserve these motor vehicles, prevent their decline, keep them in good working order, and preserve their originally intended life. As a result, we cannot conclude Appellant's pressure washing and steam-cleaning service was used by these customers for "maintenance" purposes. They may have been having their vehicles cleaned for aesthetic, advertising, public relations or other such purposes. We conclude Appellant has failed to offer sufficient evidence to establish its burden of overcoming the presumption of validity accorded to the Tax Commissioner's findings."

See also *Safety-Kleen Corp. v. Tracy* (Dec. 11, 1998), BTA No. 1995-L-1092, unreported; *Care Leasing & Rental, Inc. v. Tracy* (June 30, 1998), BTA No. 1996-T-956, unreported.

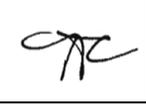
Specifically herein, beer lines may become clogged due to "heavy yeast buildups, bacteria buildups, then *** beer stone starts to develop on the inside of the line *** and those start to adhere to the interior walls of the tubing and the different components in the system, and as that does that, that buildup gets greater and greater *** and that's what causes the clog in the lines," preventing the beer from flowing. H.R. at 22. Through its inspection services, if a clog is discovered, Great Lakes uses back pressure with compressed gas to remove the clog. Additionally, on an every eight-week basis, a special solution is run through the system to further cleanse the system. H.R. at 26, 30, 65-66. To attempt to prevent clogs from forming, Great Lakes utilizes equipment that "sends an audible signal internally throughout the beer line. *** The *** system agitates the beer inside the line 24 hours a day *** [so as to] not allow bacteria or growth of any type of particulates to adhere to the walls it's running against." H.R. at 38. Any other problems identified through its inspection of the equipment are then referred to its service department, who perform repairs to the draft beer systems. H.R. at 29.

Based upon the foregoing, we conclude that it is reasonable to draw a distinction between the act of removing dirt/contaminants from tangible personal property simply for purposes of making it "clean" or "fresh," i.e., cleaning, and the act of removing dirt/contaminants from tangible personal property so that it will continue to operate properly, i.e., preventative maintenance. Based upon the testimony of Great Lakes' witness, we find the equipment inspection services under consideration, which are performed on a regular schedule, usually a four-week cycle and include taking an overview of the entire system (documenting pressure settings, cooler temperatures, glycol system temperatures, the finished pour, condition of the fittings and couplers, and the appearance and condition of the beer lines and insulation) and determining

whether there are any clogs in the beer lines or faucets and removing anything discovered in order to confirm the “overall operational capacity of the system” and “ensure that the draft system is operating at its optimum performance” constitute regular maintenance, necessary for the proper functioning of the draft beer system. H.R. at 12-14, 19-20, 32, 37, 66; Exs. A-G.

In consideration of the foregoing, we agree with Great Lakes that the service it provides “is more of a service/preventative program than a sanitation program.” H.R. at 39. It is imperative for Great Lakes’ customers to have “clean” lines in order for their draft beer systems to operate properly. Accordingly, Great Lakes offers a regular maintenance program to its customers to maintain their systems on a regular schedule. Any cleaning of the system is only part of the overall maintenance provided, i.e., is incidental to the regular maintenance service provided. Based upon our agreement with Great Lakes’ initial premise, we need not address its other specifications of error set forth in its notice of appeal.

Therefore, this board has determined that Great Lakes met its burden of proof herein, and, as such, we find that the Tax Commissioner’s findings were unreasonable and unlawful. It is the decision and order of the Board of Tax Appeals that the final determination of the commissioner be reversed.

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