

OHIO BOARD OF TAX APPEALS

ENVIRONMENTAL QUALITY
MANAGEMENT INC, (et. al.),

Appellant(s),

vs.

JEFFREY A. MCCLAIN, TAX
COMMISSIONER OF OHIO, (et.
al.),

Appellee(s).

CASE NO(S). 2018-1194

(SALES TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s)

- ENVIRONMENTAL QUALITY MANAGEMENT INC
Represented by:
LANIE HOLLINGER
US TAX RECOVERY PARTNERS
1845 SIDNEY BAKER STREET
KERRVILLE, TX 78028

For the Appellee(s)

- JEFFREY A. MCCLAIN, TAX COMMISSIONER OF OHIO
Represented by:
CHRISTINE T. MESIROW
ASSISTANT ATTORNEY GENERAL
OFFICE OF OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FLOOR
COLUMBUS, OH 43215

Entered Thursday, August 8, 2019

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

The appellant taxpayer appeals a final determination of the Tax Commissioner, in which he denied appellant's application for refund of sales tax. This matter is now considered upon the notice of appeal and the transcript certified by the Tax Commissioner. We note that appellant attached several documents to its notice of appeal that were not previously made part of the record during the proceedings before the Tax Commissioner. Because they were not submitted at a hearing before this board, we will not consider these documents as part of the record. See *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13 (1996).

Appellant filed a request for refund of sales tax that was paid along with a yearly

software fee for the use of Internet-based software during the time period of December 1, 2013 through December 31, 2016. In its application, appellant stated that the basis for the refund was that the sales tax was paid on exempt items, claiming that the items purchased were shipped out of state. Appellant asserted that it paid sales tax on 100% of the purchase price, providing invoices as evidence of the sales tax paid at the time of its purchases. Appellant is headquartered in Cincinnati, Ohio, but claims that because 58% of its employees with access to the software are located outside of Ohio, 58% of the sales tax paid should be refunded. After a review of the application, appellant was asked to provide additional information, including contracts between it and the software vendors, copies of canceled checks to prove that the invoices were paid in full, including the tax, a list of employee names along with their position description at the time of the purchase for each license, the location where the licenses will each be used, and a product description for each license type. Appellant did not request a hearing and did not submit the additional information requested. The commissioner issued a final determination affirming the denial of the refund claim, noting that the invoices reflect a “ship to” address in Cincinnati, Ohio, and that appellant failed to put forth documentary evidence to establish that the users were located outside of Ohio. Appellant appealed the final determination to this board.

On appeal, a taxpayer challenging a determination of the commissioner must prove that the findings were incorrect because “the tax commissioner’s findings are presumed valid subject to rebuttal.” *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, ¶14. The findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (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 v. Kosydar, 38 Ohio St.2d 135 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138 (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 (1983).

In the present appeal, appellant elected to waive a hearing before this board. Consequently, this board is confined to review only those materials certified in the transcript certified by the commissioner. See *Pi In The Sky, L.L.C. v. Testa*, 155 Ohio St.3d 113, 2018-Ohio-4812, ¶25. As this board has explained, a notice of appeal "is not an adequate substitute for reliable documentary and testimonial evidence. The Notice of Appeal merely constitutes unsworn, unproven statements, claims and allegations. Evidence presented at a hearing is accepted only upon conditions designed to insure its reliability. Appellants must first be sworn on oath. Their sworn testimony is then scrutinized and subjected to cross-examination. Documentary evidence is also subjected to the scrutiny of the parties and their counsel." *Cunagin v. Tracy* (Mar. 31, 1995), BTA No. 1994-P-1083, unreported, at 3. See also *Powderhorn v. Lake Cty. Bd. of Revision*, 11th Dist. Lake No. 2007-L-071, 2008-Ohio-1024. Thus, an appellant's statements in, and attachments to, the notice of appeal do not rise to the level of evidence upon which we can rely in making our determination herein, as they constitute mere contentions, submitted outside this board's hearing process. See *Columbus Bd. of Edn.*, supra; *Executive Express, Inc. v. Tracy* (Nov. 5, 1993), BTA No. 1992-P-880, unreported. Thus, our review is confined to the evidence included in the transcript certified by commissioner.

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), unless the transaction is specifically exempted. R.C. 5739.02; 5741.02. In this case,

appellant claims an exemption from sales tax for multiple points of use, which is defined by R.C. 5739.033. In pertinent part, R.C. 5739.033 provides that the location of a sale for purposes of sales tax is sourced to the location where the consumer receives the property or the address for the consumer. Generally, if a business consumer purchases a digital good, computer software, or a service available for use in more than one taxing jurisdiction, the business may report and pay the appropriate tax to each jurisdiction where concurrent use occurs. In this case, however, appellant merely alleges the concurrent use and has not provided sufficient evidence to establish that such exemption applies.

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		
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