

OHIO BOARD OF TAX APPEALS

S&R Fab, Inc.,)
)
 Appellant,) CASE NO. 2002-V-1119
)
 vs.) (SALES TAX)
)
) DECISION AND ORDER
 Thomas M. Zaino,)
 Tax Commissioner of Ohio,)
)
 Appellee.)

APPEARANCES:

For the Appellant - Stebelton, Aranda & Snider
Matthew E. Johnson
109 North Broad Street
P.O. Box 130
Lancaster, OH 43130-0130

For the Appellee Jim Petro
Attorney General of Ohio
Janyce Katz
Assistant Attorney General
State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410

Entered July 11, 2003

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed on behalf of appellant S&R Fab, Inc. (“S&R”). S&R appeals a final determination of the Tax Commissioner conditionally granting its application for remission of penalties and additional charges. The application relates to a sales tax assessment issued to S&R for the period beginning January 1, 1996 and ending June 30, 1998.

The matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript (“S.T.”) certified to this board by the Tax Commissioner, and testimony provided at hearing before this board.¹

The final determination of the Tax Commissioner reads, in pertinent part:

“The petitioner is a manufacturer and retailer of steel building components. This assessment arose from an audit of its sales during the period from January 1, 1996 through June 30, 1998. Initially the petitioner objected to the entire assessment. Subsequently the petitioner withdrew its objection to the tax, and requested remission of the penalties and additional charges. The right to a hearing has been waived.

“***

“The request for remission of the penalties and additional charges is allowed conditionally ***.” (S.T. at 1)

S&R’s notice of appeal² consists of a cover letter contesting the merits of the underlying assessment and a copy of the final determination of the Tax Commissioner.

The statutory transcript before us reflects that on December 21, 1999, an officer of S&R designated Mr. Richard A. Lundy, partner of GBQ, certified public accountants and consultants, as its authorized representative. (S.T. at 16) Thereafter, Mr. Lundy filed the petition for reassessment with the Tax Commissioner (S.T. at 11, 15), and Mr. Lundy sent a follow-up correspondence on behalf of S&R. (S.T. at 9) In a letter dated May 30, 2000, Mr. Lundy indicates: that the assessed tax and interest is

¹ Subsequent to the hearing conducted before this board (at which no representative of appellant appeared) on February 4, 2003, appellant retained counsel who requested another hearing be scheduled

correct, that S&R wishes to withdraw its petition for reassessment, and it further waives its right to a hearing. (S.T. at 3) On June 1, 2000, Ms. Lisa Campbell, office manager at S&R, sent correspondence, which states:

“Per our discussion on June 1, 2000 at 1:55 p.m., we **do not wish to withdraw our petition for a hearing on the above assessment.**”

“Richard A. Lundy from GBQ Certified Public Accountants had sent you a correspondence dated May 30, 2000 stating that we wish to withdraw our petition. This is untrue, and for the record, the firm of GBQ no longer represents us in this matter. ***” (S.T. at 5, emphasis in original.)

Further, the letter is directed to Mr. Stanley T. Bialczac of the Ohio Department of Taxation.

Nowhere in the Tax Commissioner’s final determination is there any mention of Ms. Campbell’s purported phone call to Mr. Bialczac or the correspondence clearly indicating the taxpayer’s desire to proceed to the merits of its petition for reassessment.

Initially, we recognize the general proposition that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut this presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 28 Ohio St.2d 69. Moreover, the taxpayer is assigned the burden of showing in what manner

because S&R’s president, Rod Stepleton, was not aware of the hearing. On May 30, 2003 this board conducted a second hearing at which both parties appeared.

² Said appeal was filed on behalf of S&R by a representative of an accounting firm.

and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

In the case before this board, the Tax Commissioner conditionally allowed the remission of penalties and additional charges associated with the underlying assessment.

S&R's notice of appeal does not raise the issue of the accountant's purported waiver of the hearing and underlying merits nor its revocation of said withdrawal.

R.C. 5717.02 provides in pertinent part:

“[A]ppeals shall be taken by the filing of a notice of appeal with the board, and the tax commissioner ***. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner *** and shall also specify the errors therein complained of ***.”

Generally, we do not have jurisdiction over issues not raised by a taxpayer with particularity in its notice of appeal. *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *CNG Development Company v. Limbach* (1992), 63 Ohio St.3d 28. However, we do have the ability to reach alternative arguments to alleged errors raised. *Goodyear Tire & Rubber Co. v. Limbach* (1991), 61 Ohio St.3d 381; *Buckeye International Inc., v. Limbach* (1992), 64 Ohio St.3d 264.

Additionally, R.C. 5717.03 provides, “If the board finds that issues not raised on the appeal are important to a determination of a controversy, it may remand the case for an administrative determination and the issuance of a new *** order.”

In *Key Services Co. v. Zaino*, 95 Ohio St.3d 11, 2002-Ohio-1488, the Ohio Supreme Court held that limiting this board's jurisdiction to only those issues

decided by the Tax Commissioner and specified in the taxpayer's notice of appeal was improper and held that this board had jurisdiction "to consider all evidence relevant to" the taxpayer's eligibility for a refund.

It is clear that the final determination relies upon the accountant's withdrawal of the petition for reassessment and waiver of hearing, which operated to prevent the merits of S&R's claims from being addressed. However, we find that the final determination failed to also consider S&R's immediate revocation of its former accountant's purported waiver of the petition for reassessment. As such, we find that said failure to consider the taxpayer's revocation was important to the determination of the controversy that was before the Tax Commissioner. R.C. 5717.03.

Accordingly, it is the decision and order of the Board of Tax Appeals that the present matter be remanded for an administrative determination of S&R's claims raised in its petition for reassessment and the issuance of a new final determination of the Tax Commissioner.

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