

The Tax Commissioner's final determination reads in part as follows:

"If the total assessment is paid within sixty days after receipt of this final determination, the penalty shall be 10%. In this circumstance, the assessment is adjusted as follows:

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Use Tax	\$34,738.97	\$3,473.90	\$38,212.87
Preassessment			
Interest	\$ 6,708.17	0.00	\$ 6,708.17
	Total-----		\$44,921.04"

Appellant's notice of appeal reads in part as follows:

"The Tax Commissioner erred when formulating a mark-up analysis of appellant's supplier purchase records by disregarding appellant's records and documentation.

"The Tax Commissioner's (sic) erred when formulating his mark-up analysis by only using supplier purchase records from 1999 for a mark-up sales volume calculation he used for sales during the period October 1, 1996 to December 31, 1998.

"The Tax Commissioner's (sic) erred when formulating his mark-up analysis of appellant's supplier purchase records by his failure to consider an adjustment to sales volume for overpour, theft, and spillage."

The matter was submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript certified to this board by the Tax Commissioner.

("S.T.") An evidentiary hearing before this board was waived by the parties.

First, the board notes that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121.

In addition, the taxpayer has the affirmative duty to come forward and prove the Tax Commissioner's findings are unreasonable, unlawful, or erroneous. *Manfredi Motor Transit Co. v. Limbach* (Aug. 17, 1990), BTA No. 1987-F-279, unreported. When no competent and probative evidence is presented by the appellant to show that the commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Averill v. Limbach* (Aug. 23, 1991), BTA No. 1990-C-1647, unreported.

Appellant, R & K Entertainment, Inc., ("R & K"), is an operator of a medium-sized nightclub and bar. After having sent appellant two 10-day letters (dated June 20, 2000 and June 22, 2000) and receiving no records in response, the commissioner's agent contacted three beer distributors, the state liquor store, and the pop distributor for records. The records covered 1999 to about August 29, 2000 and were used as a test period for the subject audit. An agreement letter was sent with the June 20, 2000 10-day letter with no response. This agreement letter detailed agreement to an audit for the period in question. S.T. at 55, 67.

The 10-day letters read in pertinent part as follows:

"TEN DAY LETTER

"June 20, 2000

"R & K Entertainment Inc.
DBA Club 128
128 Main Street
Toledo, OH 43605

"Dear Taxpayer:

“Enclosed is an agreement letter recommending procedures to be used to calculate any outstanding sales tax liability. If the addressed procedures are acceptable, please sign the agreement letter and return it in the enclosed envelope or deliver it to One Government Center, Suite 1400, Toledo, Ohio 43604. Should you prefer to suggest an alternative method to calculate any outstanding audit liability, this must be done by submitting your proposal in writing. You are limited in the amount of time available to submit an alternative method.

“This letter serves as your written notice that, upon the receipt of this letter, you have ten days to supply the agent conducting the audit with an alternative method in which to determine any sales tax liability on sales. Your alternative method should be explained and supported in detail.

“Your failure to respond to this written request will result in the completion of this audit using the procedures set forth in the enclosed agreement letter.

“TEN DAY LETTER

“June 22, 2000

“R & K Entertainment Inc.
DBA Club 128
128 Main Street
Toledo, OH 43605

“Dear Taxpayer:

“This letter serves as your notice that, upon written receipt of this letter, you have ten days to supply the agent conducting the audit with all pertinent sales and purchase records in which to determine any tax liability on your sales or purchases. The period of the audit is July 1, 1996 through December 31, 1999. You must deliver these records to One Government Center, Suite 1400, Toledo, Ohio 43604.

“Your failure to respond to this written request will result in the completion of this audit using any available

information. If you have any questions contact Supervisor Daniel Ritter or myself at (419)245-2881.”

The commissioner’s agent’s remarks on the history of the matter before us in pertinent part are as follows:

“On March 17, 2000 Agent Donald E. Anderson tried to contact Robert Croak, president of R & K Entertainment Inc. The agent left a message, and sent the pre-audit letter. The letter requested that all pertinent records for the audit be delivered to the Toledo District Office by March 31, 2000. The letter included form TBOR-1, and the taxpayer’s bill of rights pamphlet. The vendor never appeared with any records nor did they contact the agent in response to the letter.

“After March 31, 2000 passed, the agent left several messages for Mr. Croak. The agent did not receive a response to the messages; therefore the agent delivered a 10-day records letter to the business on April 25, 2000. This 10-day letter was delivered to the business and signed for by an employee (Receipt on left side). On May 8, 2000 the agent finally received a call from Mr. Croak. Mr. Croak stated that he would deliver all records by May 22, 2000. The agent agreed with this date. Again, the deadline for presenting records passed and no records were made available by the vendor.

“After leaving several more messages, and hearing no response, the agent determined it would be necessary to contact the beer and liquor distributors. The agent spoke with the beer distributors, all of whom stated that the only records that were readily available were for the year 1999 and forward. The agent decided to use the year of 1999 as a test check. The agent then requested and received the purchase records from the three beer distributors. On June 9, 2000 the agent went to Rays Party Store, the local distributor of hard liquor in the area. On June 12, 2000 the agent received a call from Rob Croak. Mr. Croak stated that he would have the records and would call the agent back by June 19, 2000. On June 22, 2000 the agent sent another 10-day letter and agreement letter. The letter was mailed certified and signed for on June 23, 2000 (Receipt

on left side). Again, Mr. Croak did not appear with any records nor did he offer in writing, or verbal, an alternative method to conduct the audit.

“Because no response was received, the agent went forward with the records on hand.”

S.T. at 55, 56.

A review of the statutory transcript reveals that R & K supplied the commissioner with the following information:

<u>Description</u>	<u>S.T. Location</u>
A Dec. 5, 1998 advertising \$1 drinks and \$1 cover “Dollar Bill’s Night”	26
A “free pass” advertising \$1 domestic beer (expired 1/1/98)	27
A flyer advertising a “Spring Break 2001 Psyche Up Party” announcing “\$1 domestics, \$2 32-oz. monster drafts.”	28
An updated flyer advertising Thursday night special of \$1.50 “domestic’s 32-oz drafts.”	29
An unidentified typed out price listing of “Summer 1999 Prices & Specials” for different drinks along with special deals listed for Thursdays, Saturdays and Fridays.	30
An affidavit of Jaime Walton stating that he was employed at appellant’s club from June 1999 to August 2000 and notes special promotion nights with lower drink prices.	31
An affidavit of Dustin Shoenhofer in which he states promotional pricing of certain drinks occurred on certain days. (Employment periods and the timeframe covered by his statements are unknown.)	32
Two pages from “The (Un)Official Internet Bartender’s Guide” listing bar measurements.	33-34
A manufacturer’s guide to “AccuPour” - a bottle-top liquor pourer.	35-39
Pages from “The Professional Guide to Bartending.”	40-42

R & K's first assignment of error is that the commissioner erred by disregarding R & K's records and documentation. We disagree. The record is devoid of any detailed or substantive evidence supplied by R & K. The few advertising flyers supplied, an unidentified typed out summer price list, two limited affidavits (one with no reference to timeframes at all) and several pages taken from three different guidebooks do little to show how the commissioner erred in his mark-up analysis. There simply is no evidence in the record to support R& K's contention. Therefore, we deny appellant's first assignment of error.

Appellant's second assignment of error is that the commissioner used only supplier purchase records from 1999 to calculate sales for October 1, 1996 to December 31, 1998.

R.C. 5739.11 requires each and every vendor to "keep complete and accurate records of sales, together with a record of the tax collected on the sales ***." R.C. 5739.13 provides the Tax Commissioner with the ability to monitor sales reporting activity within the state to assure that excise taxes are properly collected, reported, and paid. That section provides, in pertinent part:

"When information in the possession of the commissioner indicates that the amount required to be collected *** is greater than the amount remitted by the vendor *** the commissioner may audit a sample of the vendor's sales for a representative period to ascertain the per cent of exempt or taxable transactions *** and may issue an assessment based on the audit."

Ohio Adm. Code 5703-9-02, the administrative section promulgated by the Tax Commissioner, elaborates upon the preceding statute, stating, in part:

“(A) Since all sales of tangible personal property in this State are presumed to be subject to Sales Tax until the contrary is established, the burden of proof rests upon each vendor to show what part, if any, of their gross receipts from sales resulted from nontaxable sales.

“Each vendor must maintain complete and accurate records which include both:

“(1) Primary records such as purchase invoices, bills of lading, sales invoices, guest checks, exemption certificates, tax payment receipts, and cash register tapes;

“(2) Secondary records such as bank deposit receipts and day books, journals, or any other records in which accumulated data is recorded.

“Any record in which accumulated data is recorded by the vendor must be supported by complete detail records from which such data was accumulated.

“Sales invoices and cash register tapes for taxable sales must have separately stated thereon the total price and the tax amount charged, which amounts are to be accumulated and recorded in secondary record.

“All records must be preserved for a period of four years unless the Commissioner consents, in writing, to their destruction within the period or by order requires that they be kept for a longer period.

“The tax collected by a vendor, as trustee for the State of Ohio, is a collection for the benefit of the State and no person other than the State shall derive any benefit from such collection other than that provided for in Revised Code 5739.12.”

In the event a vendor does not have records sufficient to determine the accuracy of reported taxable sales and tax collected and remitted, R.C. 5739.13 provides the Tax Commissioner with the authority to assess “such vendor based upon information in the commissioner’s possession.” The auditing agent’s reliance upon

distributors' invoices was appropriate in the absence of evidence specifying which invoices represented sales to which the taxpayer was not a party. See *T & D Tavern, Inc. dba Cagny's v. Tracy* (Aug. 6, 1999), BTA No. 1997-S-1179, unreported. See, also, Ohio Adm. Code 5703-9-02(B). Appellant has failed to show that the commissioner's sample audit was not representative of the subject assessment period. We deny R & K's second assignment of error.

R & K's third assignment of error is that the commissioner failed to consider the appellant's losses due to "overpour, theft, and spillage." Notice of appeal. Appellant has not quantified its loss in this regard. Without some evidence of actual loss, this board is unable to find appellant is entitled to the claimed credit. In *24 Hours, Inc. v. Tracy* (May 21, 1999), BTA No. 1997-M-1389, unreported, we considered a similar claim and stated:

"A generalized description of losses incurred from theft and spoilage does not meet the appellant's burden. We have no credible or competent evidence which corroborates Mr. Abdelsalam's testimony." *Id.* at 4.

Appellant has simply filed a copy of the Accu-pour guide, S.T. at 34-39, and attached a statement to its petition for reassessment which reads as follows:

"The Commissioner's determination was flawed in that he failed to recognize that the Vendor's employees free pour liquor. The Vendor did not have an accu-pour system and had no way of controlling overpouring, spillage or even theft. The Commissioner's determinations fail to allow for any of the above." S.T. at 46.

The appellant in this case has similarly failed to present competent, probative evidence corroborating the amount of purchases which were allegedly subject to overpouring, spillage, or theft.

As set forth above, appellant primarily contests the methodology utilized by the Commissioner in determining the amount of taxable sales. Although the appellant is not precluded from contesting the audit, if it is claimed that the liability for taxable sales is excessive, the burden is upon appellant to establish its actual tax liability or any other error in the assessment by competent, probative evidence. *Alcan, supra*; *Federated Dept. Stores v. Lindley* (1983), 5 Ohio St.3d 213. In this case, the appellant has not submitted any such evidence quantifying the errors claimed or demonstrating its actual tax liability. Therefore, we find that the Tax Commissioner was correct in the method used to calculate appellant's tax liability.

Based upon the foregoing, we find that the final determination of the Tax Commissioner is correct and hereby affirm such determination.

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