

OHIO BOARD OF TAX APPEALS

Joann Koenig, et al.,)
)
 Appellants,) (MUNICIPAL INCOME TAX)
)
 vs.) ORDER
)
 Village of Botkins Board of Review and) (Compelling Discovery)
 Joy Bond, Tax Commissioner for the)
 Village of Botkins,)
)
 Appellees.)

APPEARANCES:

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Entered August 10, 2007

The Board of Tax Appeals considers this matter pursuant to a motion to compel filed by the appellants. The appellants ask the BTA to order the appellees to produce certain documents requested as part of its discovery request. The appellees

counter that the documents are either not relevant to these proceedings or are confidential documents not subject to discovery.

This appeal concerns the taxing of the appellants' distributive shares of the net profit of a non-resident subchapter S corporation for the 2004 tax year. Appellants allege that, pursuant to R.C. 718.01(F), the village of Botkins lacks the authority to levy the tax unless the village was "imposing, assessing, and collecting" the tax on December 6, 2002. See R.C. 718.01(F)(9)(c). The appellants maintain through their notice of appeal that the village of Botkins was not, in fact, imposing, assessing, and collecting the tax on or prior to December 6, 2002.

In preparation for this litigation, the appellants have requested that the village provide them with entries and other records, including tax returns, that either (1) show that the village was imposing, assessing, and collecting the subject tax on or before December 6, 2002, or (2) reflect the taxes due to the village by any individual on an S corporation shareholder's distributive share of net profits on or prior to December 6, 2002. See Appellant's First Request for the Production of Documents, at 1. The appellees have not produced the documents, claiming that "to the extent Appellants seek from the Tax Commissioner the production of tax returns, and information contained in those returns, regarding persons who are not parties to the instant appeal, such information and documentation is, and must remain, confidential." Appellees' Response to Appellants' Motion to Compel, at 3. As a result, the appellees in essence ask this board to issue a protective order over the subject documents by

denying the motion to compel. See Appellees' Response to Appellants' Motion to Compel, at fn. 1.

Ohio has a liberal discovery policy, which, subject to privilege, enables opposing parties to obtain from each other all evidence that is material, relevant and competent, notwithstanding its admissibility at trial. See Civ.R 26(B)(1) and Ohio Adm. Code 5717-1-11(A); *Fletcher v. Nationwide Mut. Ins. Co.*, 2003-Ohio-3038, at ¶ 14. See, also, *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693. Management of the discovery process is within the sound discretion of the tribunal. *Fletcher*, supra, at ¶ 14.

Ohio Adm. Code 5717-1-11(D) provides that the board may, upon a showing of good cause, issue a protective order restricting discovery. Similarly, Civ.R. 26(C) provides for the issuance of a protective order as follows:

“Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information

enclosed in sealed envelopes to be opened as directed by the court.”

The parties maintain that the question of whether the requested documents may be relevant to this appeal depends upon the correct interpretation of R.C. 718.01(F)(9)(c), i.e., the correct interpretation of the phrase “imposing, assessing, and collecting” the tax. The appellees state that the existence of a village ordinance authorizing the tax on or before December 6, 2002 is sufficient. The appellants maintain that the village must have been actually imposing and collecting the tax as of December 6, 2002. The board, however, finds that it need not, and does not, consider at this time the proper interpretation of the statute for purposes of ruling upon appellants’ motion.

The appellants’ request is for information concerning the taxing activities of the village as of the date specified in R.C. 718.01(F)(9)(c). Such information appears to be relevant to issues now before this board. In order for appellants to pursue claims related to the imposing, assessing, and collecting of the subject tax under R.C. 718.01(F)(9), they must be entitled to gain access to information that is in the commissioner’s and village’s possession. See, e.g., *U.S. Sprint Communications Co. L.P. v. Limbach* (Interim Order, May 24, 1991), BTA No. 1989-F-423, unreported. Further, the disclosure of such information allows the appellants to explore potential weaknesses in their position. This is one of the justifications for liberal discovery encouraged by the discovery rules. Civ.R. 26, at Staff Notes.

The appellees raise additional concerns about disclosure of the requested information in that some of the documents contain personal information about non-party taxpayers. Appellees indicate that they have a duty to maintain the confidentiality of the information provided in any tax returns held by the village and its tax commissioner.

R.C. 718.13 creates a statutory duty under which any tax information gained by a municipal corporation must be kept confidential.¹ The appellees' desire to protect tax information related to non-party taxpayers is therefore understood and commendable. The duty to keep tax information confidential, however, is not absolute. Such information may be disclosed "in accordance with a proper judicial order." R.C. 718.13. This board has previously held that it has the authority to order the disclosure of information subject to statutorily created confidentiality provisions during the discovery phase of pending litigation. See, e.g., *U.S. Sprint Communications Co. L.P.*, supra; *Newcome Corp. v. Tracy* (Interim Order, Jan. 23, 1998), BTA No. 1997-M-320, unreported; *Ohio Bell Tel. Co. v. Zaino* (Interim Order, Mar. 17, 2003), BTA Nos. 2002-K-559, et seq., unreported.

In order for the appellants to pursue their claims regarding the authority of the village to impose the subject tax under R.C. 718.01(F)(9), the appellants require access to relevant documents under the control of the village and the commissioner.

¹ R.C. 718.13 provides: "Any information gained as a result of returns, investigations, hearings, or verifications required or authorized by this chapter or by a charter or ordinance of a municipal corporation levying an income tax pursuant to this chapter is confidential, and no person shall disclose such information except in accordance with a proper judicial order or in connection with the performance of that person's official duties or the official business of the municipal corporation as authorized by this chapter or the charter or ordinance authorizing the levy. The tax administrator of the municipal corporation may furnish copies of returns filed under this chapter to the internal revenue service and to the tax commissioner."

The board is cognizant that some of the information contained in those documents is sensitive information concerning non-party taxpayers. This board must therefore consider whether there is a means of balancing appellants' ability to investigate their specifications of error against the privacy expectations of taxpayers not related to this appeal. The board finds that Civ.R. 26 provides a method. Civ.R. 26(C) authorizes this board to restrict the disclosure of sensitive information by, inter alia, ordering that "certain matters not be inquired into or that the scope of the discovery be limited to certain matters." Civ.R. 26(C)(4). Here, the BTA finds that appellees' confidentiality concerns may be adequately addressed by ordering the redaction of any non-party taxpayer names, addresses, account numbers, social security numbers, and other personal identifying information from the requested documentation. Appellants will still have access to information about the village's imposition, assessment, and collection of tax on the distributive shares of the net profit of a non-resident subchapter S corporation.

As a final matter, while discovery under the civil rules and the rules of this board is governed by a liberal philosophy, its scope is not all encompassing. Discovery is subject to certain limitations concerning the relevancy of the information to the subject matter of the pending action. *Heritage Hills, Ltd. v. Ross Cty. Bd. of Revision* (Interim Order, Jan. 17, 1997), BTA Nos. 1996-T-776, 780, unreported.

Here, appellants request all documents pertaining to the taxing of distributive shares of the net profit of non-resident subchapter S corporations both on and *before* December 6, 2002. By its terms, the request would seek information going

back to the time the tax was allegedly first imposed by the village in 1975. The board finds this to be overly broad and burdensome, and further finds that the information sought for the entire period would not be relevant to the pending action, which pertains to the village's activities around the date specified by statute. As such, production of the requested documents will be limited to tax years 2000, 2001, and 2002.

In conclusion, the Board of Tax Appeals grants appellants' motion to compel the requested documents, subject to the time limitations outlined above and the redaction of the specified personal information. The BTA orders that the appellees shall, within twenty-eight (28) days of the issuance of this order, comply with the discovery requests previously served by the appellants, in accordance with the terms and limitations of this order.

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