

OHIO BOARD OF TAX APPEALS

J.Z.E. Electric, Inc.,)
)
Appellant,)
)
vs.)
)
William W. Wilkins, Tax Commissioner)
of Ohio,)
)
Appellee.)

CASE NO. 2006-A-2218

(USE TAX)

DECISION AND ORDER

APPEARANCES:

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Entered May 19, 2009

Ms. Margulies, Mr. Johrendt, and Mr. Dunlap concur.

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by J.Z.E. Electric, Inc. J.Z.E. appeals from a final determination of the Tax Commissioner, in which the commissioner affirmed, with modification, a use tax assessment previously issued against J.Z.E. on purchases made during the period of July 1, 2001 through June 30, 2004.

J.Z.E. specifies that the commissioner erred in assessing use tax on J.Z.E.'s purchase of employment services. Because we conclude that J.Z.E. has failed to show by competent and probative evidence that it either has remitted the tax in question or qualifies for an exception under R.C. 5739.01(JJ)(3), we affirm the commissioner.

J.Z.E. is an electrical contractor operated under the trade name of Hilliard Electric. During the period in question, J.Z.E. purchased employment services from Tradesmen International Inc. ("Tradesmen") and Construction Labor Contractors ("CLC"), as well as temporary employment services by Clock Electric. Richard Marconi, controller for J.Z.E., testified before this board concerning the transactions involving the foregoing companies, indicating that J.Z.E.'s many projects were staffed with not only its core group of electricians, which were J.Z.E.'s own employees, but also supplemented with "leased" employees from Tradesmen and CLC. H.R. at 14. He expounded further that the leased employees were hired for different purposes and were divided into two categories: leased workers and temporary workers. He explained that J.Z.E. planned to keep the leased workers indefinitely, while the temporary workers were used by J.Z.E. for a limited duration only. H.R. at 15, 57. The "leased" electricians would turn in their time cards to CLC and Tradesmen, who would then invoice J.Z.E. for their time. H.R. at 22.

With regard to the provision of workers by Clock Electric to J.Z.E., Mr. Marconi indicated that the arrangement was conceived simply as a favor to Clock, as agreed to by each company's officers. H.R. at 37. Since Clock did not have enough

business to keep all of its employees busy, J.Z.E. agreed to use/borrow Clock employees and compensate Clock for the cost of the employees. H.R. at 35.

R.C. 5739.01(JJ) defines “employment service” as “providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service.” R.C. 5739.01(JJ)(3) provides that “employment service” does not include “[s]upplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” Thus, to be excluded from taxation under R.C. 5739.01(JJ)(3), J.Z.E. must prove two elements: (1) there is a contract of at least one year between the service provider and the purchaser, and (2) the contract specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis. See *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶18, motion for clarification granted, 102 Ohio St.3d 1214, 2004-Ohio-2085.

J.Z.E. argues that its transactions with CLC and Tradesmen qualify for the statutory exclusion to the aforementioned definition, i.e., R.C. 5739.01(JJ)(3). With regard to the labor supplied by Clock Electric, the commissioner claims that it meets the definition of “employment service,” and as such, should be taxed; however, J.Z.E. claims that the payments it made to Clock were not “sales,” as defined in R.C.

5739.01(B), and even if they were sales, they would be exempt as casual sales, pursuant to R.C. 5739.02(B)(8).

In reviewing J.Z.E.'s specifications of error, we observe that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. 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* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. 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* (1983), 5 Ohio St.3d 213. Additionally, all sales of tangible personal property within Ohio are presumed to be subject to tax until shown otherwise. We emphasize that exceptions and exemptions to taxation are to be strictly construed in favor of taxation, and the burden rests with the taxpayer to affirmatively establish its right thereto. *National Tube Co. v. Glander* (1945), 157 Ohio St. 407. See, also, *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29.¹

J.Z.E. points to the terms included in its two contracts with CLC and Tradesmen as support for its position that it qualifies for the exclusion from the use tax

¹ J.Z.E.'s specifications of error relate to the assessment of use tax. R.C. 5739.02 levies a sales tax upon all retail sales made in Ohio. A similar use tax is imposed by R.C. 5741.02. If a transaction is not subject to sales tax, it follows that the transaction, if made within Ohio, is also not subject to use tax. R.C. 5741.02(C). Since our analysis of the relevant sales and use tax provisions is essentially identical in the context of this appeal, we shall refer only to the applicable sales tax provisions, unless circumstances require otherwise.

in question. S.T. at 118-122. Specifically, the first requirement for exclusion from the definition of “employment service” is that there is a contract of at least one year between the service provider and the purchaser. Both of the subject contracts were provided to the commissioner and are ongoing in nature, i.e., still in effect at the time they were provided and testified to before this board. Both contracts indicate that each of the companies will provide personnel to J.Z.E. “for a period of not less than one year.” S.T. at 118, 121. Further, the commissioner acknowledged that the contracts state “they are for a period of at least one year.” S.T. at 1. Thus, we find that the first prong of the requirements for exclusion from the definition has clearly been met.

With regard to the second prong, the contracts must specify that each employee covered under the contract is assigned to the purchaser on a permanent basis. The contracts under consideration simply state that the workers are provided “on an indefinite basis as opposed to a temporary or short-term basis.” They do not identify the workers by name, nor do they identify the type of work to be completed. S.T. at 118, 121. The Supreme Court, in *H.R. Options*, supra, stated that:

“We start with the understanding that an employee assigned on a permanent basis need not be assigned to an employer forever. We believe that in the context of R.C. 5739.01(JJ)(3), assigning an employee on a permanent basis means assigning an employee to a position for an indefinite period, i.e., the employee’s contract does not specify an ending date and the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions. Thus, both the contract and the facts and circumstances of the employee’s assignment are factors that must be reviewed to determine whether the employee is being assigned on a permanent basis.

“When the Tax Commissioner’s agents examine an employment contract, they must be able to determine at that time whether an employee has been assigned on a permanent basis. The contract, along with the facts and circumstances of the assignment, should permit the Tax Commissioner’s agent to determine permanency.” Id. at ¶ 21, 22.

In reviewing J.Z.E.’s contracts with Tradesmen and CLC, there are no starting/ending dates listed for the workers that will be provided to J.Z.E. Further, no individual employees are named and no individual employee contracts were submitted for our review, nor does it appear that such contracts were made available to the commissioner during his audit. In addition, according to Mr. Marconi’s testimony, it appears that all workers used, whether deemed leased/permanent or temporary in nature, were hired under the same contract. H.R. at 15. Clearly, from the face of the contracts, there was no way to determine which type of employee, i.e., leased/permanent or temporary was being supplied. Even after a review of work records, Mr. Marconi could not make any conclusions about the category in which each worker should be placed. Thus, Mr. Marconi was forced to ask the operations manager to identify which category each of the leased employees belonged in, based upon the manager’s recollection of how each worker was, in fact, used. H.R. at 30, 35. See, also, Exs. A-C.

In consideration of the foregoing, this board is unwilling to rely upon hearsay statements to establish which employees were leased/permanent and which were temporary. J.Z.E.’s contracts for employment services clearly do not set forth on

their face the two categories of workers to be leased. Further, its own records do not clearly delineate, from the outset, the nature of an employee's assignment, whether it be permanent or temporary. There is nothing in the contracts or J.Z.E.'s work records to definitively indicate whether a worker hired under such contracts was intended to work as a long term/permanent worker or a temporary worker and, ultimately, we are unable to accept an ambiguity in the record that fails to corroborate for us the precise nature of each employee's assignment. J.Z.E.'s burden is not limited to the mere assertion that it is within the statutory exclusion; it must affirmatively demonstrate that each employee in question was placed with J.Z.E. permanently. *Advantage Services, Inc. v. Tracy* (Oct. 30, 1998), BTA No. 1995-T-1391, unreported, at 14. J.Z.E. has failed to meet this burden.

Finally, with regard to the employees provided by Clock Electric, we note that there is no written agreement delineating the arrangement between Clock Electric and J.Z.E. As such, based upon the record before us, we find that the activity undertaken by Clock meets the definitional requirements of an employment service, i.e., supplying personnel on a temporary basis to perform work under the supervision of another while receiving wages from the provider of the service, i.e., Clock. Further, the record does not support Clock's exclusion from the employment service definition since we do not know the duration of Clock's agreement with J.Z.E. Even if Clock's agreement with J.Z.E. was found to be at least one year in duration, arguably, it appears from the nature of such agreement that it was intended to be temporary from the outset: to provide workers to J.Z.E. while its own workload was reduced, simply

to keep its workforce employed continuously. Thus, regardless of how the parties viewed their arrangement or their ultimate intent upon entering into the agreement, based upon the record before us, we find Clock provided workers to J.Z.E. pursuant to an employment services agreement, on a temporary basis only.

In summary, we find that J.Z.E. has failed to prove by competent and probative evidence that the commissioner's final determination was in error. We further find that, upon review, the commissioner's determination was supported by a preponderance of the record and was in accordance with law. Accordingly, we affirm the Tax Commissioner's final determination.

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